SELECTED CASES

IN

CONSTITUTIONAL LAW

BY

H. EDGAR BARNES, L. L. B.
Wharton School, University of Pennsylvania

AND

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PREFACE

This collection of cases in Constitutional Law is designed primarily for the use of students in the course in elementary constitutional law as given in the Wharton School of Finance and Commerce of the University of Pennsylvania. The aim of the compilers has been to present a brief statement of the salient facts of the leading cases, and to include generally only those portions of the opinions of the court as are related to the particular subject or point under discussion. In many cases, however, such as Marbury *v.* Madison, McCulloch *v.* Maryland, and Gibbons *v.* Ogden, the opinion has been given at greater length because of the importance of the principles established and in order to show the steps in the reasoning of the court. It has been impossible to include in this collection many important and historical cases, but it is hoped that the cases herein contained will enable the student to form an idea of the function of the courts in interpreting the meaning of the Constitution.

H. E. B.
B. A. M.

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CONSTITUTION OF THE UNITED STATES.

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

SECTION 1. All legislative powers herein granted, shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

SEC. 2. The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

[Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.][1] The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such a manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative, and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. 3. The senate of the United States shall be composed of

1—The clause included in brackets is amended by the fourteenth amendment, second section.

two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president *pro tempore,* in the absence of the vice-president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

SEC. 4. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof, but the congress may at any time by law make or alter such regulations except as to the places of choosing senators.

The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of

either house on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SEC. 6. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emolument whereof shall have been increased during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SEC. 7. All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

SEC. 8 The congress shall have power:—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of

the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities, and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money, to that use, shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth of the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings;—And

To make laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SEC. 9. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SEC. 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payments of debats; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive power shall be vested in a president of the United States of America. He shall hold office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list

of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, is such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose, by ballot, one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall, in like manner, choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice-president.][1]

The congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

1—This clause has been superseded by the twelfth amendment.

SEC. 2. The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law. But the congress may, by law, vest the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

SEC. 3. He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SEC. 4. The president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citi-

zens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

SEC. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SEC. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due

SEC. 3. New states may be admitted by the congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of, and make all needful

rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

Sec. 4. The United States shall guaranty to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the congress; *provided,* that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this constitution, shall be as valid against the United States, under this constitution, as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound therby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

The ratification of the conventions of nine states, shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention, by the unanimous consent of the states present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

[Signed by] GEORGE WASHINGTON, *President, and Deputy from Virginia,* and by thirty-nine delegates.

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

SECTION 1. The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president; and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate:—the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president, shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SEC. 3. No person shall be a senator or representative in congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SEC. 2. The congress shall have power to enforce this article by appropriate legislation.

CHAPTER I.
THE EXECUTIVE DEPARTMENT.

SECTION I.
The Manner of Choosing the President.

McPHERSON *v.* BLACKER.
146 U. S., 1. 1892.

A statute of the State of Michigan passed May 1st, 1891, provided for the appointment of electors for President and Vice-President of the United States by the election of an elector and an alternate elector in each of the twelve congressional districts into which the State of Michigan was divided, and of an elector and an alternate elector at large in each of two districts of the State, known as an eastern and a western district. The constitutionality of the act was questioned on the ground that it was not competent for the legislature to direct this manner of appointment because the State under the constitution should appoint its electors as a unit, and could not delegate its authority to subdivisions created for that purpose. It was argued that the appointment of electors by districts was not an appointment by the state, because all its citizens otherwise qualified were not permitted to vote for all the presidential electors.

The Supreme Court of Michigan held that the law was valid and constitutional, whereupon an appeal was taken to the Supreme Court of the United States.

Mr. Chief Justice Fuller delivered the opinion of the court.

The State does not act by its people in their collective capacity, but through political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature, unless by the fundamental law power is elsewhere reposed.* * * * If the legislature possesses plenary authority to direct the manner of appointment, and might itself authorize the appointing power by joint ballot or concurrence of the two houses, or according to such mode as designated, it is difficult to perceive why, if the legislature prescribes as a method of appointment choice by vote, it must necessarily be by general ticket and not by districts. In other words, the act of appointment is none the less the act of the state in its entirety because arrived at by districts, for the act is the act of political agencies duly authorized to speak for the state, and the combined result is the expression of the voice of the state, a result reached by direction of the legislature to whom the whole subject is committed. (The Court then discusses the

methods of the choice of electors adopted by the legislatures of the several states in the presidential elections, showing that in the early elections, the electors were generally appointed outright by the state legislatures and concludes, as follows: "In 1824 the electors were chosen by popular vote, by districts and by general ticket in all the states excepting Delaware, Georgia, Louisiana, New York, South Carolina and Vermont, where they were still chosen by the legislature. After 1832 electors were chosen by general ticket in all the states excepting South Carolina, where the legislature chose them up to and including 1860"). * * * * From this review, in which we have been assisted by the laborious research of counsel, and which might have been greatly expanded, it is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislature in the manner of appointment of electors. * * * * In short, the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States. They are, as remarked Mr. Justice Gray in re Green, 134 U. S. 377, "no more officers or agents of the United States than are the members of the state legislature when acting as electors of Federal senators, or the people of the states when acting as the electors of representatives in Congress." Congress is empowered to determine the time of choosing the electors, and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the state is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and Federal influence might be excluded. We repeat that the main question arising for consideration is one of power and not of policy, and we are unable to arrive at any other conclusion than that the act of the legislature of Michigan of May 1, 1891, is not void as in contravention of the Constitution of the United States for want of power in its enactment. The judgment of the Supreme Court of Michigan must be affirmed.

SECTION II.

The President's Power of Appointment.

MARBURY *v.* MADISON.

1 CRANCH, 137. 1803.

This was an original proceeding brought in the Supreme Court of the United States for a mandamus commanding James Madison, Secretary of State under President Jefferson, to deliver a commission to William Marbury, the plaintiff, as a justice of the peace for the District of Columbia. The plaintiff claimed to have been appointed by President Jefferson's predecessor,

President John Adams. The particular act of Congress upon which the plaintiff relied in bringing this action was the Judiciary Act of 1789, which authorized the Supreme Court of the United States to issue writs of mandamus to persons holding office under the authority of the United States.

Mr. Chief Justice Marshall delivered the opinion of the court.

"In the order in which the court has viewed this subject, the following questions have been considerd and decided. 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1st, Has the applicant a right to the commission he demands?

His right originates in an Act of Congress passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years.

It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of the peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which being completed, became his property.

The second section of the second article of the Constitution declares, that, "the president shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The Third section declares, that "he shall commission all the officers of the United States."

An Act of Congress directs the Secretary of State to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President by and with the consent of the Senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations: 1st, the nomination. This is the sole act of the President, and is completely voluntary. 2d, the appointment. This is also the act of the President, and is also a

voluntary act, though it can only be performed by and with the advice and consent of the Senate. 3d, the commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all officers of the United States."

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the Senate to his own nomination. The time for deliberation has passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necesarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission.

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

The commission being signed, the subsequent duty of the Secretary of State is prescribed by law, and is not to be guided by the will of the President. He is to affix the seal of the United States to the commission and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts in this respect, under the authority of the law and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

It is not necessary that livery should be made personally to the grantee of the office. It never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the Secretary to affix the seal to the commission after it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the Secretary

for the purpose of being sealed, recorded and transmitted to the party.

To withhold his (Marbury's) commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry, which is,

2. If he has a right and that right has been violated, do the laws of his country afford him a remedy.

Where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

It remains to be inquired whether, thirdly. He is entitled to the remedy for which he applies. This depends on, first, the nature of the writ applied for, and secondly, the power of this court.

Blackstone, in the third volume of his commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from a court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice." (The court reaches the conclusion that) This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court.

"The act to establish the judicial courts of the United States authorizes the Supreme Court 'to issue writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

"The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

"The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently in some form may be exercised over the present case, because the right claimed is given by a law of the United States.

"In the distribution of this power it is declared that 'the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction.'

"It has been insisted, at the bar, that as the original grant of

jurisdiction, to the supreme and inferior courts, is general and the clause, assigning original jurisdiction to the Supreme Court, contains no negative or restrictive words, the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

"If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance.

"Affirmative words are often, in their operation, negative of other objects than those affirmed: and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

"It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

"When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

"To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

"It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

"It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appel-

late, but to original jurisdiction. Neither is it necessary, in such a case as this, to enable the court to exercise its appellate jurisdiction."

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and

is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule (for a mandamus) must be discharged.

UNITED STATES *v.* GERMAINE.
99 U. S., 508. 1878.

The defendant, Charles N. Germaine, was appointed by the Commissioner of Pensions to act as surgeon. He was to make an ex-

amination of applicants for pensions and was permitted to charge a fee of $2 for each examination. He was indicted in the District of Maine for extortion in taking fees from pensioners to which he was not entitled. The law under which he was indicted is thus set forth in section 12 of the Act of 1825:

"Every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, according to the aggravation of his offense." The defendant sought to escape punishment under the statute on the ground that he was not an officer of the United States within the meaning of this act, though he might be an agent or employee of the government.

The Judges of the Circuit Court for the District of Maine were divided in their opinion, so the case was certified to the United States Supreme Court.

MR. JUSTICE MILLER delivered the opinion of the court.

"The argument is that provision is here made for the appointment of *all* officers of the United States, and that defendant, not being appointed in either of the modes here mentioned, is not an *officer,* though he may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers.

The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to offices inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish any one not appointed in one of those modes. If the punishment were designed for other than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; and this has been done where it was so intended, as in the sixteenth section of the act of 1846, concerning embezzlement, by which any officer *or agent* of the United States *and all persons participating in the act,* are made liable.

As the defendant here was not appointed by the President or by a court of law, it remains to inquire if the Commissioner of Pensions, by whom he was appointed, is the head of a department, within the

meaning of the Constitution, as is argued by the counsel for plaintiffs.

That instrument was intended to inaugurate a new system of government, and the departments to which it referred were not then in existence. The clause we have cited is to be found in the article relating to the executive, and the word as there used has reference to the subdivision of the power of the executive into departments, for the more convenient exercise of that power. One of the definitions of the word given by Worcester is, "a part or division of the executive government, as the Department of State, or of the Treasury." Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department. Here we have the Secretary of State, who is by law the head of the Department of State, the Departments of War, Interior, Treasury, &c. And by one of the latest of these statutes reorganizing the Attorney-General's office and placing it on the basis of the others, it is called the Department of Justice. The association of the words "heads of departments" with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of the departments. Such, also, has been the practice, for it is very well understood that the appointments of the thousands of clerks in the Departments of the Treasury, Interior, and the others, are made by the heads of those departments, and not by the heads of the bureaus in those departments.

So in this same section of the Constitution it is said that the President may require the opinion in writing of the principal officer in each of the executive departments relating to the duties of their respective offices.

The word "department," in both these instances, clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other.

While it has been the custom of the President to require these opinions from the Secretaries of State, the Treasury, of War, Navy, &c., and his consultation with them as members of his cabinet has been habitual, we are not aware of any instance in which such written opinion has been officially required of the head of any of the bureaus, or of any commissioner or auditor in these departments.

If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. (In U. S. v. Hartwell the court said), the term embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond

and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.

No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

We answer that the defendant is not an officer of the United States, and that judgment on the demurrer must be entered in his favor.

BLAKE *v.* UNITED STATES.

103 U. S., 227. 1880.

Blake was a post chaplain in the United States Army and during a period of temporary insanity wrote a letter to the Secretary of War which was construed by the latter to be a resignation and was accepted as such. One Gilmore was thereupon nominated by the President for the office and the nomination was confirmed by the Senate. Some years later Blake became sane again, and the circumstances under which he had written the letter to the Secretary of War being made known to the President, he was re-appointed to an office similar to that which he had formerly held. Blake brought suit in the Court of Claims for salary which he claimed was due him for the period intervening between the date his resignation was accepted and the date of his re-appointment. His claim was dismissed, whereupon he appeal to the United States Supreme Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

The claim is placed upon the ground that before, at the date of, and subsequent to, the letter addressed to the Secretary of War, which was treated as his resignation, he was insane in a sense that rendered him irresponsible for his acts, and consequently that his supposed resignation was inoperative and did not have the effect to vacate his office. Did the appointment of Gilmore, by and with the advice and consent of the Senate, to the post-chaplaincy held by Blake, operate, *proprio vigore,* to discharge the latter from the service, and invest the former with the rights and privileges belonging to that office? If this question be answered in the affirmative, it will not be necessary to inquire whether Blake was, at the date

of the letter of December 24, 1868, in such condition of mind as to enable him to perform, in a legal sense, the act of resiging his office; or, whether the acceptance of his resignation, followed by the appointment of his successor, by the President, by and with the advice and consent of the Senate, is not, in view of the relations of the several departments of the government to each other, conclusive, in this collateral proceeding, as to the fact of a valid effectual resignation.

From the organization of the government under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government.

Upon the general question of the right to remove from office, as incident to the power to appoint, *Ex parte* Hennen (13 Pet. 259) is instructive. That case involved the authority of a district judge of the United States to remove a clerk and appoint some one in his place.

The court, among other things, said: "All offices, the tenure of which is not fixed by the Constitution or limited by law must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.

"It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

* * * *

In Du Barry's Case, Attorney-General Clifford said that the attempt to limit the exercise of the power of removal to the executive officers in the civil service found no support in the language of the Constitution nor in any judicial decision; and that there was no

foundation in the Constitution for any distinction in this regard between civil and military officers.

In Lansing's Case, the question arose as to the power of the President, in his discretion, to remove a military storekeeper. Attorney-General Cushing said: "Conceding, however, that military storekeepers are officers, or, at least, quasi officers, of the army, it does not follow that they are not subject to be deprived of their commission at the will of the President.

"I am not aware of any ground of distinction in this respect, so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way as it is to civil officers, but the legal applicability to both classes of officers is, it is conceived, the settled construction of the Constitution. It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired in both cases alike the whole constitutional power of the President."

* * * *

Such was the established practice in the Executive Department, and such the recognized power of the President up to the passage of the act of July 17, 1862, entitled "An Act to define the pay and emoluments of certain officers of the army, and for other purposes," the seventeenth section of which provides that "the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service, either in the army, navy, marine corps, or volunteer force, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote, the public service."

* * * *

(The Act of July 17, 1866, provides) "no officer in the military or naval service shall, in time of peace, be dismissed from the service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof." * * * *

Our conclusion is that there was no purpose, by the act of July 13, 1866, to withdraw from the President the power, with the advice and consent of the Senate, to supersede an officer in the military or naval service by the appointment of some one in his place. If the power of the President and Senate, in this regard, could be constitutionally subjected to restrictions by statute (as to which we express no opinion), it is sufficient for the present case to say that Congress did not intend by that section to impose them. It is, in substance and effect, nothing more than a declaration, that the power theretofore exercised by the President, without the concurrence of the Senate, of summarily dismissing or discharging officers of the army or the navy, whenever in his judgment the interest of

the service required it to be done, shall not exist, or be exercised, *in time of peace,* except in pursuance of the sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their places.

It results that the appointment of Gilmore, with the advice and consent of the Senate, to the office held by Blake, operated in law to supersede the latter, who thereby, in virtue of the new appointment, ceased to be an officer in the army from and after, at least, the date at which that appointment took effect,—and this, without reference to Blake's mental capacity to understand what was a resignation. He was, consequently, not entitled to pay as post-chaplain after July 2, 1870, from which date his successor took rank. Having ceased to be an officer in the army, he could not again become a post-chaplain, except upon a new appointment, by and with the advice and consent of the Senate. Mimmack *v.* United States, 97 U. S. 426, 437.

As to that portion of the claim covering the period between April 28, 1869, and July 2, 1870, it is only necessary to say, that, even were it conceded that the appellant did not cease to be an officer in the army by reason of the acceptance of his resignation, tendered when he was mentally incapable of understanding the nature and effect of such an act, he cannot recover in this action. His claim for salary during the above period accrued more than six years, and the disability of insanity ceased more than three years before the commencement of this action. The government pleads the Statute of Limitations, and it must be sustained. Congress alone can give him the relief which he seeks. *Judgment Affirmed.*

SECTION III.

The President's Diplomatic and Treaty Making Powers.

JONES *v.* UNITED STATES.

137 U. S., 202. 1890.

This was an indictment, found in the District Court of the United States for the District of Maryland, alleging that Henry Jones, late of that District, on September 14, 1889, at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular state or district of the United States, murdered one Thomas N. Foster. Navassa Island was situated in the Caribbean Sea and contained a deposit of guano. An Act of Congress relating to the discovery and occupation by citizens of the United States of guano islands not within the lawful jurisdiction of any other government, provided that the President should have the power to extend the jurisdiction of the United States over the islands so occupied. The District of Maryland was the District of the United

States into which Jones was first brought from Navassa Island. In the District Court the Government sought to establish the right of the federal court to try Jones for the murder committed on the above mentioned island under R. S. 5339, providing for the punishment of murder committed "within any fort, arsenal, dock-yard, magazine, or any other place or district or country under the exclusive jurisdiction of the United States." The counsel for Jones questioned the validity of Act of Congress concerning guano islands, especially the power of the President under that Act. Jones was convicted in the District Court and an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens, or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. * * * *

Who is the sovereign, *de jure* or *de facto,* of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. * * * *

(In Williams *v.* Suffolk Ins. Co.) this court held that the action of the executive department, on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there by any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." "In the present case, as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." 13 Pet. 420.

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose

laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. * * * *

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States and in the possession of the United States under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power, conferred on the President of the United States by section 1 of the Act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President.

Conviction in the lower court is affirmed.

THE PEOPLE *v.* GERKE.

5 CALIFORNIA, 381, (1855).

On August 23, 1853, one Auguste Deck, a citizen of Prussia, died intestate in California, leaving, undisposed of, a large amount of real estate. The defendant, Gerke, was appointed administrator of the estate by the Probate Court. One Clark afterwards purchased from the absent heirs a large portion of the property. The Attorney General of California then brought this action to escheat Deck's estate to the State of California, on the ground that the laws of California provided for the escheat of the real estate held by foreigners in California, when such foreigners died intestate. The case was appealed to the highest court of California, from the judgment of the lower court, which had been rendered in favor of the State.

HEYDENFELDT, J., delivered the opinion of the court.

By a convention between the United States and the Kingdom of Prussia, made in the year 1828, the fourteenth article provides, "And when on the death of any person holding real estate within the territory of the one party, such real estate would, by the laws

of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation."

The Attorney-General, in support of the information filed in this case, denies the power of the Federal government to make such a provision by treaty, and the determination of this case depends upon the solution of that question. Cases have frequently arisen where aliens have claimed to inherit by virtue of treaty provisions analogous to the one under consideration, and in all of them, so far as I have examined, the stipulations were enforced in favor of the foreign claimants.

But in none of these cases was the question raised as to the power of the Federal government to make the treaty. It has been the practice of the government from an early period after the ratification of the Constitution, and its power is now, I believe, for the first time disputed.

The language which grants the power to make treaties contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal government would be ineffectual, and the reserved rights of the States would be subverted. This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it, to the treaty-making grant, was recognized both by Mr. Jefferson and John Adams, two leaders of opposite schools of construction. See Jefferson's Works, Vol. III, p. 135; and Vol. VI, p. 560.

It may, therefore, be assumed that, aside from the limitations and prohibitions of the Constitution upon the powers of the Federal government, "the power of treaty was given, without restraining it to particular objects, in as plenipotentiary a form as held by any sovereign in any other society." This principle, as broadly as I have deemed proper to lay it down, results from the form and necessities of our government, as elicited by a general view of the Federal compact. Before the compact, the States had the power of treaty-making as potentially as any power on earth; it extended to every subject whatever. By the compact, they expressly granted it to the Federal government in general terms, and prohibited it to themselves.

The general government must, therefore, hold it as fully as the States held who granted it, with the exceptions which necessarily flow from a proper construction of the other powers granted, and those prohibited by the Constitution. The only questions, then, which can arise in the consideration of the validity of a treaty are: First, Is it a proper subject of treaty according to international law or the usage and practice of civilized nations? Second, Is it prohibited by any of the limitations in the Constitution?

Taking for illustration the present subject of treaty, no one will deny that, to the commercial States of the Union, and indeed to the citizens of any State who are engaged in foreign commerce, a stipulation to remove the disability of aliens to hold property is of paramount importance, or, at any rate, it may be so considered by the States, and demanded as a part of their commercial polity.

Now, as by the compact the States are absolutely prohibited from making treaties, if the general government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern. * * * *

One of the arguments at the bar against the extent of this power of treaty is, that it permits the Federal government to control the internal policy of the States, and, in the present case, to alter materially the statutes of distribution.

If this was so to the full extent claimed, it might be a sufficient answer to say, that it is one of the results of the compact, and, if the grant be considered too improvident for the safety of the States, the evil can be remedied by the Constitution-making power. I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. Its disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern times, and changes in the political and social condition of nations, have rendered without force or consequence. The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect, unaltered and unimpaired in word or sense. If there is one object more than another which belongs to our political relations, and which ought to be the subject of treaty regulations, it is the extension of this comity which is so highly favored by the liberal spirit of the age, and so condusive in its tendency to the peace and amity of nations.

Even if the effect of this power was to abrogate to some extent the legislation of the States, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent. * * * *

I can see no danger which can result from yielding to the Federal government the full extent of powers which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon some subjects, the policy of a State government, as shown by her legislation, is dependent upon the policy of foreign governments, and would be readily changed upon the principle of mutual concession. This can only be effected by the action of that branch of the State sovereignty known as the general government, and when effected, the State policy must give way to that adopted by the governmental agent of her foreign relations.

It results from these views that the treaty of 1828, with Prussia, is valid, and that aliens, subjects of Prussia, are protected by its provisions.

The judgment is reversed, and the cause remanded.

Note.—See also *The Chinese Exclusion Case,* page—162.

SECTION IV.

The President's Executive Power.

IN RE NEAGLE.

135 U. S., 1. 1889.

David Neagle, a deputy marshall of the United States for the District of California, was brought by writ of *habeas corpus* before the United States Circuit Court upon a petition that he was being unlawfully imprisoned by the State of California upon the charge of having murdered one David S. Terry. Neagle claimed that the killing of Terry was done by him in pursuance of his duty as a deputy marshall in defending the life of Mr. Justice Field, a justice of the United States Supreme Court, while the latter was discharging his duties as circuit judge of the Ninth Circuit. The facts showed that there was a settled purpose on the part of Terry and his wife to murder Mr. Field on his official visit to California in 1889, because of some animosity due to a judicial decision rendered by him. Neagle had been appointed by the Attorney-General of the United States, acting for the President, and the United States, to guard Mr. Field against attack. Terry met Mr. Field upon a railroad train and made a murderous attack upon him, which Neagle had reason to believe would result in his death unless he interferred, whereupon he shot and killed Terry. Neagle was arrested and imprisoned in the county jail in San Joaquin county, California, charged with murder.

Upon petition the United States Circuit Court ruled "that the prisoner was in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, and it was therefore ordered that he be discharged from custody." An appeal was then taken to the Supreme Court of the United States.

MR. JUSTICE MILLER ruled as follows:

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal

of the Northern District of California, and the Attorney-General, and the District Attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field. * * * *

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States Court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited [R. S., § 788], in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus,* that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language. * * * *

The same answer is given in the present case. To the objection

made in argument, that the prisoner is discharged by this writ from the power of the State court to try him for the whole offence, the reply is, that if the prisoner is held in the State court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the State court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offence to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

IN RE DEBS.

158 U. S., 564. 1894.

In May, 1894, there arose a dispute between the Pullman Palace Car Company and its employees which resulted in a strike of most of the employees of the company. The officers of the railway union tried to force a settlement of differences by creating a boycott against the cars of the company, and had prevented certain railroads running out of Chicago from operating their trains and were combining to extend such boycott by causing strikes among employees of all railroads hauling Pullman cars. A bill of complaint was filed on July 2, 1894, by the United States in the Circuit Court of the United States in Illinois against Debs and others. The bill set out that twenty-two railroads were engaged in interstate commerce, into and out of the city of Chicago; that each of the roads was under contract to carry the mails, and were post roads of the government; that they were required also to carry the troops and military forces of the United States. An injunction was issued by the court restraining the defendants and all persons conspiring with them from interfering, hindering or obstructing the business of the railroads as interstate carries and carriers of mail. This injunction was duly served upon the defendants. Subsequently, on July 17th, 1894, an attachment for contempt of court was issued against the officers of the railway union and others because of their disobedience to the order of the court, and after a hearing they were sentenced to imprisonment. Having been committed to jail, they applied to the Supreme Court for a write of *habeas corpus*.

MR. JUSTICE BREWER delivered the opinion of the court:

Under the power vested in Congress to establish postoffices and post roads, Congress has, by a mass of legislation, established the great postoffice system of the country, with all its details of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offenses against it. Obviously these powers given to the national government over interstate commerce, and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. * * * Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? * * * The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the

national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia are at the service of the nation to compel obedience to its laws. * * * So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. * * * Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; * * * that to it is committed power over interstate commerce and the transmission of the mail; * * * that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions.

* * * *

The petition for a writ of *habeas corpus* is denied.

SECTION V.

The President's Legislative Power.

FIELD *v.* CLARK.

143 U. S., 649. 1891.

This was a suit brought by Marshall Field & Co., importers, in the Circuit Court of the United States for the Northern District of Illinois, against John M. Clark, the collector of the port of Chicago, to recover duties claimed to have been illegally exacted on imported merchandise. The main issue was whether the Tariff Act of October 1, 1890, had itself the force of law. One of the grounds upon which the validity of the act was attacked was that it delegates to the President the power of levying taxes and duties, which power, by Sections 1 and 8 of Article 1 of the Constitution, is vested in Congress. The Circuit Court decided that the duty was legally exacted and gave judgment against Marshall Field & Co., who thereupon appealed the case to the Supreme Court of the United States.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiffs in error contend that this section, so far as it au-

thorizes the President to suspend the provisions of the act relating to the free introduction of sugar, molasses, coffee, tea, and hides, is unconstitutional, as delegating to him both legislative and treaty-making powers, and, being an essential part of the system established by Congress, the entire act must be declared null and void. On behalf of the United States it is insisted that legislation of this character is sustained by an early decision of this court and by the practice of the government for nearly a century, and that, even if the third section were unconstitutional, the remaining parts of the act would stand. * * * *

That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, Congress itself determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected, and paid, on sugar, molasses, coffee, tea, or hides, produced by or exported from such designated country, while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. The words, "he may deem," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and axactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of

Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspension, certain duties should be imposed. * * * *

What has been said is equally applicable to the objection that the third section of the act invests the President with treaty making power.

The court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty making power to the President.

(The Supreme Court affirmed the judgment of the Circuit Court.)

SECTION VI.

The President's Pardoning Power.

EX PARTE GARLAND.

4 WALLACE, 333. 1866.

The petitioner, Garland, was an attorney and a citizen of Arkansas. In May, 1861, Arkansas purported to withdraw from the Union and attached herself to the Confederate States. The petitioner followed the State and was one of her representatives in the Congress of the Confederacy. In July, 1865, he received from the President of the United States a full pardon for all offences committed by his participation, direct or implied, in the rebellion. On July 2, 1862, Congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit in the United States. On January 24, 1865, Congress, by a supplementary act, extended its provisions to attorneys of the courts of the United States. One of the sentences in the prescribed oath was, "that he has not voluntarily given aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States. Garland produced his pardon and petitioned the Supreme Court for leave to practice as an attorney before the court.

MR. JUSTICE FIELD delivered the opinion of the court.

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for

past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges its imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. * * * *

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest court of the States to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the posssesion of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorney and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded * * * *

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the

ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a State under the form of creating qualifications we have held in the case of Cummings *v.* The State of Missouri [4 Wall. 277], and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." Article II. § 2.

The power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude form its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

The pardon produced by the petitioner is a full pardon "for all offences by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalities and disabilities attached to the offence of treason, committed by his participation in the Rebellion. So far as that offence is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offence, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offence notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offence, the pardon may be avoided,

and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted.

Note.—See also Cummings *v.* Missouri, 4 Wall, 227; *Ex parte* Wells, 18, Howard 307.

SECTION VII.

The President's Military Power.

LUTHER v. BORDEN.

7 HOWARD, 1. 1848.

At the time of the American Revolution, Rhode Island did not, as did the other States, adopt a new Constitution, but continued the form of government established by the charter of Charles II in 1663, making only such alterations by acts of the Legislature as were necessary to adapt it to its condition and rights as an independent State. Many citizens became dissatisfied with the charter government. A convention was called to draw up a new Constitution, to be submitted to the people of the State and a vote taken upon it. On the return of the votes, the convention declared that the Constitution was adopted and ratified by a majority of the people of the State. Elections for Governor, members of the Legislature and other offices were then held. These officers assembled and proceeded to organize the new government. The charter government did not acquiesce in the proceedings, but passed laws declaring void the new Constitution; put the State under martial law and called out the militia. The house of the plaintiff, Martin Luther, was broken into in order to arrest him for supporting the authority of the new government. This was an action of trespass by him against the defendants, who were in the military service of the charter government. The defence was that the acts were justified on the ground of the insurrection and because they were in the military service of the State. The plaintiff replied that the trespass was committed by the defendants of their own proper wrong, as the charter government no longer existed.

The issue was then raised as to which government was the legally constituted one. A verdict in favor of the old government and the defendants was rendered in the United States Circuit Court. An appeal was taken to the Supreme Court.

CHIEF JUSTICE TANEY delivered the opinion.

The question which the plaintiff proposed to raise by the

testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judical power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavoring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. * * * *

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the council of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and

could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue. * * * Congress was not called upon to decide the controversy. Yet the right to decide was placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnuesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States, or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts, when the conflict is raging—if the judicial power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, pun-

ish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign State of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals. *Judgment of the Circuit Court is affirmed.*

MARTIN *v.* MOTT.

12 WHEATON, 19. 1827.

This was an action originally begun in the courts of New York to recover certain goods and chattels belonging to Jacob E. Mott, the plaintiff in the lower court, which had been taken to satisfy a fine and forfeiture imposed upon him by a court-martial, for a failure to enter the service of the United States as a militia man,

when called upon by the President of the United States, during the war with Great Britain in 1812. The plaintiff claimed that the taking of his goods was unjustifiable and among things questioned the authority of the President to decide whether the particular exigency had arisen to justify the calling forth of the militia, as contemplated in the words of the Constitution, and acts of Congress providing the President with power "to execute the laws of the Union, suppress insurrections and repel invasions." The highest court of the State of New York gave judgment in favor of Mott, the plaintiff in the lower court, whereupon an appeal was taken to the Supreme Court of the United States.

The opinion was delivered by MR. JUSTICE STORY.

"For the more clear and exact consideration of the subject, it may be necessary to refer to the Constitution of the United States, and some of the provisions of the act of 1795. The Constitution declares that Congress shall have power 'to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions;' and also 'to provide for organizing, arming, and discipling the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the Constitution. It has not been denied here that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

"The power thus confided by Congress to the President is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen,

or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay and every obstacle to an efficient and immediate compliance, necessarily tend to jeopardize the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the Commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and of watching over the internal peace of the confederacy" (The Federalist, No. 29), these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. Besides, in many instances the evidence upon which the President might decide that there is imminent danger of invasion might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself is strongly fortified. The words are "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the President, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the Constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to

"take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case we are all of opinion that such is the true construction of the Act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

. . . . . .

(The Supreme Court reversed the judgment of the State Court.)

See also the case of *Ex parte Milligan,* page 200.

CHAPTER II.

THE LEGISLATIVE DEPARTMENT.

SECTION I.

Power of Congress over Taxation.

Sub Section A.

Extent of the Federal Power.

THE COLLECTOR *v.* DAY.

11 WALLACE, 113. 1870.

This suit was instituted by Day against the Collector of Internal Revenue of the United States to recover the sum of $61.51 which he had been compelled to pay as a tax upon his salary as a judge of the Court of Probate and Insolvency for the County of Barnstable, Massachusetts, for the year 1866 and 1867. The salary was fixed by law and was paid out of the state treasury. It was contended that the act levying the tax was unconstitutional as the Federal Government could not impose a tax upon the salary of the judicial officer of a State. A judgment was given in favor of Day in the lower court whereupon an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE NELSON delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In Dobbins *v.* the Commissioners of Erie County, 16 Pet. 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of McCulloch *v.* Maryland, 4 Wheat. 316, and Weston *v.* Charleston, 2. Pet. 449, were referred to as settling the principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers."

The soundness of this principle is happily illustrated by the Chief

Justice in McCulloch *v.* Maryland, 4 Wheat. 432. "If the States," he observes, "may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government." "This," he observes, "was not intended by the American people. They did not design to make their government dependent on the States." Again, (Ib. 427.) "That the power of taxing it (the bank) by the States may be exercised so far as to destroy it, is too obvious to be denied." And, in Weston *v.* The City of Charleston, 2 Pet. 466, he observes. "If the right to impose the tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of each State and corporation may prescribe. * * * *

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States. * * * *

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and

unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaird, and in respect to which the State is as independent of the paired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws and which concerns the exercise of a right reserved to the States? *

* * *

And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the Veazie Bank *v.* Fenno, 8 Wall. 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch *v.* Maryland, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihiliated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject, at all, to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, that "the reserved rights of the States, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain. *Judgment affirmed.*

VEAZIE BANK *v.* FENNO.

8 WALLACE, 533. 1869.

Congress passed an act on July 13, 1866, which provided, "That every national banking association, State bank or State banking association shall pay a tax of ten per centum on the amount of notes of any person, State bank or State banking association, used for circulation and paid out by them after the 1st day of August, 1866." Under this act a tax of ten per cent. was assessed upon the Veazie Bank, for its notes issued for circulation, after the day named in the act. The bank was a corporation chartered under the laws of the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected, were issued under this authority. The bank paid the tax under protest. The Circuit Court for Maine, in which action was brought to recover the amount of the tax paid, being divided in its opinion, the case was brought to the Supreme Court upon question of the constitutionality of the act (1) That it was a direct tax and had not been apportioned according to population (2) That the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

Opinion delivered by CHIEF JUSTICE CHASE:

* * * * Much diversity of opinion has always prevailed upon the question, what are direct taxes. Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. * * * * We are obliged, therefore, to resort to historical evidence, and to seek the meaning

of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And, considered in this light, the meaning and application of the rule, as to direct taxes, appeals to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject. In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act fixing its total sum * * * This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. * * * * It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes. * * * * The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. * * * * Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority, to lay and collect. We do not say there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property. But in the case before us, the object of taxation is not the franchise, but property created or contracts made and issued under the franchise, or power to issue bank bills. * * * * It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress. The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot for that reason only be pronounced contrary to the Constitution. * * * *

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It it not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will perhaps satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country would be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

Sub-Section B.

Limitations of the States' Power of Taxation.

M'CULLOCH *v.* MARYLAND.

4 WHEATON, 316. 1819.

In 1816 Congress incorporated *"The Bank of the United States."* (This was the second United States Bank). In 1817 a branch of the bank was established in Baltimore, Maryland. On February 11, 1818, the State of Maryland passed an act imposing a tax "on all Banks, or branches thereof, in the State of Maryland, not chartered by the legislature." No notes were to be issued by such banks except on stamped paper. M'Culloch, the cashier of the Baltimore branch of the United States Bank, issued certain notes without using stamped paper. The State thereupon brought suit in the courts of Maryland against M'Culloch, to recover the taxes claimed to be due under the statute and the penalties for the violation of the statute.

(The statute provided that in case it was violated certain penalties should be imposed.) The State court gave judgment against M'Culloch, but he claimed that the State statute was unconstitutional and appealed to the Supreme Court of the United States.

MR. CHIEF JUSTICE MARSHALL delivered the the opinion of the court.

"1. The first question made in the cause, is, has Congress power to incorporate a bank?

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, de-

cided it, by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary nothwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. * * * *

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction, (unless the words imperiously require it,) which would impute to the framers of that instrument, when granting these powers for the

public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. * * * *

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof." * * * *

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered

by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means, calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the Constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by refixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. * * * *

This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too ap-

parent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of Congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. * * * *

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the power it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. * * * *

After the most deliberate consideration, it is the unanimous and decided opinion of this Court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States; and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application of this case, the cause has been

supposed to depend. These are, 1st, That a power to create implies a power to preserve. 2d, That a power to destroy if wielded by a different hand is hostile to, and incompatible with these powers to create and preserve. 3d, That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion, and is no longer to be considered questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measure of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

We are unanimously of the opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

THOMPSON *v.* UNION PACIFIC RAILROAD COMPANY.

9 WALLACE, 579. 1869.

The stockholders of the Union Pacific Railroad Company, which was incorporated by the territory of Kansas, brought suit in the United States Circuit Court for the District of Kansas to restrain the officers of the company from paying a tax levied by the State of Kansas on the property of the company in that State. The stockholders contended that as the company enjoyed certain franchises granted by Congress, in return for which they were to carry United States mail and transport troops in time of war, etc., the State was in reality taxing a Federal agency and hence the tax was unconstitutional as applied to the Union Pacific Railroad Company.

The judges of the Circuit Court were divided in their opinion, so the case was certified to the Supreme Court of the United States.

MR. CHIEF JUSTICE CHASE delivered the opinion of the court.

The main argument for the complainants, however, is that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is therefore exempt from taxation under State authority. It is to be observed that this exemption is not claimed under any act of Congress.It is not asserted that any act declaring such exemption has ever received the sanction of the National legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the General Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post-roads, to raise and support armies, and to suppress insurrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of the government, and as such was not subject to taxation by the State.

The case of McCulloch *v.* Maryland is much relied on in support of this position. But we apprehend that the reasoning of the court in that case will hardly warrant the conclusion which counsel deduce from it in this. In that case the main questions were, Whether the incorporation of the Bank of the United States, with power to establish branches, was an act of legislation within the constitutional powers of Congress, and, whether the bank and its branches, as actually established, were exempt from taxation by State legislation. Both questions were resolved in the affirmative. * * * *

It is unquestionably true that the court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities, to State legislation. And its exemption from taxation was put upon this ground. Nor was the exemption itself without important limitations. It was declared not to extend to the real property of the bank within the State; nor to interests held by citizens of the State in the institution.

In like manner other means and operations of the government have been held to be exempt from State taxation: as bonds issued for money borrowed, Weston *v.* City of Charleston, 2. Pet. 467; certificates of indebtedness issued for money or supplies, The Banks *v.* The Mayor, 7 Wall. 24; bills of credit issued for circulation, Bank *v.* Supervisors, Ib. 28. There are other instances in

which exemption, to the extent it is established in McCulloch *v.* Maryland, might have been held to arise from the simple creation and organization of corporations under acts of Congress, as in the case of the National Banking Associations; but in which Congress thought fit to prescribe the extent to which State taxation may be applied. Van Allen *v.* The Assessors, 3 Id. 573; Bradley *v.* The People, 4 Id. 459; People *v.* Commissioners, Ib. 244. In all these cases, as in the case of the Bank of the United States, exemption from liability to taxation was maintained upon the same ground. The State tax held to be repugnant to the Constitution was imposed directly upon an operation or an instrument of the government. That such taxes cannot be imposed on the operations of the government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the government, created by itself for public and constitutional ends. But we are not aware of any case in which the real estate, or other property of a corporation not organized under an act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.

* * * *

We do not doubt the propriety or the necessity, under the Constitution, of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognize the soundness of the doctrine, that no State has a "right to tax the means employed by the government of the Union for the execution of its powers." But we think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means.

No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection. Lane County v. Oregon, 7 Wall. 77. * * * *

The nature of the claims to exemption which would be set up, is well illustrated by that which is advanced in behalf of the complainants in the case before us. The very ground of claim is in the bounties of the General Government. The allegation is, that the government has advanced large sums to aid in construction of the road; has contented itself with the security of a second mortgage; has made large grants of land upon no condition of benefit to itself, except that the company will perform certain services for full compensation, independently of those grants; and will admit

the government to a very limited and wholly contingent interest in remote net income. And because of these advances and these grants, and this fully compensated employment, it is claimed that this State corporation, owing its being to State law, and indebted for these benefits to the consent and active interposition of the State legislature, has a constitutional right to hold its property exempt from State taxation, and this without any legislation on the part of Congress which indicates that such exemption is deemed essential to the full performance of its obligations to the government.

We are unable to find in the Constitution any warrant for the exemption from State taxation claimed in behalf of the complainants; and must, therefore, answer the question certified to us

In the affirmative.

UNION PACIFIC RAILROAD COMPANY *v.* PENISTON.

18 WALLACE, 5. 1873.

The State of Nebraska taxed the property of the Union Pacific Railroad Company in that State and the same question was raised as in Thompson *v.* Union Pacific Railroad Company. There was one point of difference, however, which the opinion of the Court brings out clearly.

MR. JUSTICE STRONG delivered the opinion of the court.

"It is, however, insisted that the case of Thompson *v.* The Union Pacific Railroad Company differs from the case we have now in hand in the fact that it was incorporated by the Territorial legislature and the legislature of the State of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. * * * *

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers.

CALIFORNIA *v.* CENTRAL PACIFIC RAILROAD COMPANY.

127 U. S., 1. 1887.

The State of California laid a tax upon the property of transportation companies, including franchises conferred by the United States. The State brought suit to collect the tax in its own courts,

but the railroads removed the suits to the United States Circuit Court. The Central Pacific and other railroad companies resisted the tax on the ground that the State could not constitutionally levy such a tax. The Circuit Court gave judgment for the railroad, whereupon an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

Assuming, then, that the Central Pacific Railroad Company, has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject." 2 Bl. Com. 37. Generalized, and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleaure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in McCulloch *v.* Maryland, "the power to tax involves the power to destroy." * * * *

The taxation of a corporate franchise merely as such, unless pur-

suant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.

Judgment affirmed.

Sub-Section C.

Direct and Indirect Taxes.

HYLTON *v.* UNITED STATES.

3 DALLAS, 171. 1796.

This suit was originally brought in the Circuit Court for the District of Virginia, by the United States against one Daniel Hylton to recover the penalty imposed by act of Congress of June 5, 1794, for not entering and paying the duty on a number of carriages for the conveyance of persons, which he kept for his own use. Hylton defended the suit on the ground that the tax was unconstitutional and void. The argument turned entirely upon the point whether the tax on carriages kept for private use was a direct tax. If it was not a direct tax, it was admitted to be rightly laid, within the first clause of the 8th section of Article I of the Constitution, which declares, "All duties, imposts and excises shall be uniform throughout the United States." If it were a direct tax, it was unconstitutional, under another clause of the same section of the Constitution, which provides, "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration of the inhabitants of the United States." The Circuit Court was divided in its opinion, whereupon Hylton confessed judgment as a foundation for this appeal to the Supreme Curt of the United States.

The court delivered their opinions seriatim.

The following opinion was delivered by MR. JUSTICE CHASE:

I think, an annual tax on carriages for the conveyance of persons may be considered as within the power granted to Congress to lay duties. The term duty is the most comprehensive, next to the general term tax; and practically in Great Britain, whence we take our general ideas of taxes, duties, imposts, excises, customs, etc., embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner. I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated

by the Constitution, are only two, to wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

I am for affirming the judgment of the Circuit Court.

POLLACK *v.* FARMERS' LOAN AND TRUST COMPANY.

157 U. S., 429; AND 158 U. S., 601. 1895.

This suit was instituted by Pollack and other persons, stockholders in the Farmers' Loan and Trust Company, to restrain the officers and directors of the company from paying to the United States the taxes assessed upon the net profits of the company and the incomes of all trust estates which the company held as trustee, exceeding $4000. The bill charged that the Act of Congress of August 15, 1894, relating to the collection of an income tax was unconstitutional and void (1) because it was a direct tax on real estate by being imposed on the rents, issues and profits of real estate; also that it was a direct tax on personal property and was not *apportioned* among the several States as required by the Constitution. (2) If not a direct tax, nevertheless it was unconstitutional since it was not *uniform* as required by the Constitution, as incomes under $4000 were exempted from taxation. The Act of Congress provided as follows: "There shall be assessed, levied, collected and paid annually upon the gains, profits and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends or salaries, or from any profession, trade, employment or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars," etc.

It was held that the statue was unconstitutional so far as it levied a tax on the rents or income of real estate (157 U. S., 429). On other questions involved in the case the court was unable to decide because the judges were equally divided in opinion. A second hearing was granted by the court, (158 U. S., 601).

The opinion was delivered by CHIEF JUSTICE FULLER.

****As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes, and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes

without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution, and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced substraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution. * * * *

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. * * * *

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government,

but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. If, in the changes of wealth and population in particular States, apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the States, however small, in the Senate, was stipulated for. The Constitution ordains affirmatively that each State shall have two members of that body, and negatively that no State shall by amendment be deprived of its equal suffrage in the Senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several States according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that, in the language of Chief Justice Marshall, in McCulloch *v.* Maryland, "the only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." 4 Wheat. 428. And they retained this security by providing that direct taxation and representation in the lower house of Congress should be adjusted on the same measure.

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blow to the winds in another. * * * *

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, it is not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom?

Whatever the speculative views of political economists or revenue

reformers may be, it can be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, and open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment or any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." * * * *

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived. * * *

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitu-

tional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in Warren *v.* Charlestown, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent conditional or connected, must fall with them." Or, as the point is put by Mr. Justice Matthews in Poindexter *v.* Greenhow, 114 U. S. 270, 304: "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact." * * * *

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stock, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the

act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.[1]

KNOWLTON *v.* MOORE.

178 U. S., 41. 1900.

The Act of Congress of June 13th, 1898, known as the War Revenue Act, imposed a tax on all personal property passing by will or under the intestate laws of a State, to lineal or collateral heirs. The rate of the tax was graduated according to the amount of the legacy or interest and the relationship to the decedent of the party receiving the same. It was further provided that the tax should be imposed only upon legacies or interests exceeding the sum of ten thousand dollars. One Edwin Knowlton died in Brooklyn, N. Y., in October, 1898, and his will was probated and the executors duly qualified. Moore, the Collector of Internal Revenue, demanded of the executors a full statement showing the amount of the personal estate of the deceased, and the legatees and distributees. The collector levied a tax on the legacies and distributive shares, but in fixing the rate considered the whole of the personal estate of the deceased and not the amount coming to each individual legatee under the will. As the personal estate which the deceased (Knowlton) left amounted to over two and a half millions of dollars and the rates under the statute were progressive from a low rate on legacies amounting to $10,000, to a high rate on those exceeding $1,000,000, this decision greatly increased the aggregate amount of the taxation. The tax was assessed at $42,-084.67. The executors paid the tax under protest and sued in the Circuit Court to recover the amount paid on the grounds (1) That the act was unconstitutional; (2) That the rate of the tax was improperly fixed by the assessor. The Circuit Court dismissed the

suit, whereupon the executors appealed the case to the United States Supreme Court.

MR. JUSTICE WHITE delivered the opinion of the court.

The precise meaning of the law being thus determined (*i. e.,* that the rate of the tax should be fixed by the amount of each legacy or share, and not by the amount of the entire personal estate) the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In Scholey *vs.* Rew, 23 Wall, 331, 349, * * * the question presented was the constitutionality of the provisions of the Act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said: "But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of these provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare. * * * Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity. The contention is that because the statute exempts legatees and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of Section 8 of Article 1 of the Constitution, which provides, "the duties, imports and excises shall be uniform throughout the United States. (Mr. Justice White then discusses the debates in the Constitutional Convention with reference to the meaning given to the term "uniform" by the framers of the Constitution). "Thus it is apparent that the expression, 'uniform throughout the United States,' was at that time considered as purely geographical, as being synonymous with the expression, "general operation throughout the United States,' and that no thought of

restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory.

Judgment reversed.

NOTE.—See also *Veazie Bank v. Fenno,* page 57.

SECTION II.

POWER OF CONGRESS OVER COMMERCE.

Sub-Section A.

Extent of the Federal Power.

1. IN GENERAL.

GIBBONS *v.* OGDEN.

9 WHEATON, 100. 1824.

One Aaron Ogden filed a bill praying for an injunction in the Court of Chancery of New York against Thomas Gibbons. The bill set out the several acts of the legislature of that State which secured to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of the State, with boats moved by steam or fire, for a certain term of years, which had not expired at the time the suit was brought. The statutes also authorized the court to award an injunction, restraining any person whatever from navigating those waters with boats of that description. Livingston and Fulton had assigned to one John R. Livingston, who in turn had assigned to the complainant, Ogden, the right to navigate the waters between Elizabethtown and other places in New Jersey and the City of New York. Gibbons, the defendant, in violation of the exclusive privilege held by Ogden, was running two steam boats between New York and Elizabethtown. The injunction prayed for was granted, but Gibbons in his answer stated that his boats were duly enrolled and licensed to be employed in carrying on the coasting trade, under an Act of Congress of February 18th, 1793, and he insisted on his right by virtue of such licenses to navigate the waters between the two ports. An appeal from the order granting the injunction was taken to the highest court of New York State, which upheld the injunction, from which decree the cause was carried to the United States Supreme Court.

CHIEF JUSTICE MARSHALL delivered the opinion of the court.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the Constitution and laws of the United States.

They are said to be repugnant—

1. To that clause in the Constitution which authorizes Congress to regulate commerce.

2. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. * * * *

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. * * * *

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be

understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing that all America is united in that construction which comprehends navigation in the word commerce. * * * *

The word used in Constitution, then, comprehends, and has been always understood to comprehend, navigation, within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the lan-

guage, or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematicl line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States, must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry—what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary

as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. * * * *

It has been contended, by the counsel for the appellant, that, as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much distured and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. * * *

It has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution

of acknowledged State powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the low of the State, though enacted in the exercise of powers not controverted, must yield to it. * * * *

As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well-digested but refined and metaphysical reasoning founded on these premises, explain away the Constitution of our country, and leave it a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the test of the arguments to be examined. *Injunction was dissolved.*

PENSACOLA TELEGRAPH COMPANY *v.* WESTERN UNION TELEGRAPH COMPANY.

96 U. S., 1. 1877.

The Act of Congress of July 24, 1866, provided that telegraph companies might construct and operate telegraph lines over any portion of the public domain of the United States and over and under navigable streams of the United States. On December 11, 1866, the plaintiff company was chartered by the Florida Legislature and was given an exclusive privilege to establish and maintain telegraph lines in certain counties of the State, connecting with lines from within or without the State. In 1874 the legislature

empowered a railroad company to construct a line of telegraph along its road and to sell its franchises to other telegraph companies. This grant embraced the territory of the exclusive grant given to the plaintiff by the State Act of December 11, 1866. The defendant company, claiming under the railroad company began to string their wires in this exclusive territory, and the plaintiffs filed a bill in equity in the Circuit Court for the Northern District of Florida, to enjoin the erection of the defendant's line. The question was raised whether the act of the State, conferring the exclusive privilege on the plaintiff was constitutional. Defendant argued that it was repugnant to the Federal statute of July 24, 1866.

The decree of the Circuit Court dismissed the plaintiff's bill, whereupon it appealed the case to the United States Supreme Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. Art. 1, Sec. 8, par. 3); and "to establish post-offices and post-roads" (id., par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of Gibbons *v.* Ogden, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see to it that the intercourse among the States and the transmission of intelligence are not obstructed or necessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty

per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enter upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all the various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 id. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot com-

municate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within it own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges. * * * *

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the Act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the Pensacola and Louisville Railroad Company under the arrangement made for that purpose. *Decree Affirmed.*

PENNSYLVANIA *v.* THE WHEELING AND BELMONT BRIDGE COMPANY.

18 HOWARD, 421. 1855.

The State of Virginia empowered the Wheeling, etc., Bridge Company to build a bridge across the Ohio River at a certain point. The bridge interfered with the passage of boats on the river. The State of Pennsylvania filed a bill to have the bridge removed as a public nuisance. The Supreme Court of the United States decreed that it should be removed. Pending the decree the bridge was destroyed by a storm. The bridge was rebuilt as it was originally in

spite of the court's decree. Since, however, the rendering of the above mentioned decree Congress passed an act authorizing the Bridge Company to have and maintain the bridge at the height to which it had been rebuilt. Pennsylvania moved for a writ of assistance to execute the original decree. The argument for Pennsylvania was that this Act of Congress was unconstitutional as interfering with navigation. This case was one of original jurisdiction in the Supreme Court.

Mr. Justice Nelson delivered the opinion of the court.

The defendants rely upon this act of Congress as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered, declaring it an obstruction to the navigation.

On the part of the plaintiff, it is insisted that the act is unconstitutional and void, which raises the principal question in the case.

In order to a proper understanding of this question it is material to recur to the ground and principles upon which the majority of the court proceeded in rendering the decree now sought to be enforced.

The bridge had been constructed under an act of the legislature of the State of Virginia; and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce. It was claimed, however, that Congress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and that the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of Congress, and destructive of the right derived under them; and that, to the extent of this interference with the free navigation of the river, the act of the legislature of Virginia afforded no authority or justification. It was in conflict with the acts of Congress, which were the paramount law.

This being the view of the case taken by a majority of the court, they found no difficulty in arriving at the conclusion, that the obstruction of the navigation of the river, by the bridge, was a violation of the right secured to the public by the Constitution and laws of Congress, nor in applying the appropriate remedy in behalf of the plaintiff. The ground and principles upon which the court proceeded will be found reported in 13 How. 518.

Since, however, the rendition of this decree, the acts of Congress already referred to, have been passed, by which the bridge is made a post-road for the passage of the mails of the United States, and the defendants are authorized to have and maintain it at its present site and elevation, and requiring all persons navigating the river to regulate such navigation so as not to interfere with it.

So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, is not so in the

contemplation of law. We have already said, and the principle is undoubted, that the act of the legislature of Virginia conferred full authority to erect and maintain the bridge, subject to the exercise of the power of Congress to regulate the navigation of the river. That body having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and Federal, which, if not sufficient, certainly none can be found in our system of government. * * * *

Upon the whole, without pursuing the examination further, our conclusion is, that, so far as respects that portion of the decree which directs the alteration or abatement of the bridge, it cannot be carried into execution since the Act of Congress which regulates the navigation of the Ohio River, consistent with the existence and continuance of the bridge; and that this part of the motion in behalf of the plaintiff must be denied. But that, so far as respects that portion of the decree which directs the costs to be paid by the defendants, the motion must be granted.

2. THE MEANING OF COMMERCE.

McCREADY *v.* VIRGINIA.

94 U. S., 391. 1876.

One McCready, a citizen of Maryland, was convicted and fined $500 in the Circuit Court of Gloucester County, Va., for planting oysters in Ware River, a stream in which the tide ebbs and flows. The convicition was under the provisions of a statute of Virginia, of April 18, 1874, which was as follows:

"If any person other than a citizen of this State shall take or catch oysters, or any shell fish in any manner, or plant oysters in the waters thereof, or in the Rivers Potomac or Pocomoke, he shall forfeit $500, and the vessel, tackle and appurtenances."

It was contended that the statute was in violation of the clause of the Constitution giving Congress the power to regulate commerce. The Supreme Court of the State sustained the lower court, whereupon an appeal was taken to the Supreme Court of the United States.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

* * * * Neither do we think this case is affected by the clause of the Constitution which refers power on Congress to regulate commerce, Art. 1., Sec. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of the State. In this way, the

people of Virginia may be enabled to produce what the people of other States cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them. *Judgment affirmed.*

UNITED STATES *v.* E. C. KNIGHT CO.

156 U. S., 1. 1895.

The American Sugar Refining Co., a New Jersey corporation, being in control of a large majority of the manufactories of refined sugar in the United States, acquired through the purchase of stock in four Philadelphia refineries, such disposition over those manufactories throughout the United States as gave it a practical monopoly of the business.

The United States filed a bill in equity in the Circuit Court of the United States for the Eastern District of Pennsylvania against the American Sugar Refining Company and four other corporations, among which was the E. C. Knight Company, charging that these corporations had violated the Act of Congress of July 2, 1890, (Sherman Anti-Trust Act) entitled "An act to protect trade and commerce against unlawful restraints and monopolies, "which provided, that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize or combine or conspire with other persons to monopolize trade and commerce among the several States shall be guilty of a misdemeanor." It was prayed that the agreements be cancelled and declared void and that the defendants be enjoined from carrying them out and violating said act. The Circuit Court dismissed the bill, whereupon an appeal was taken to the Supreme Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restrain of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890.

The relief sought was the cancellation of the agreements under which the stock was transferred; the redelivery of the stock to the parties respectively; and an injunction against the further performance of the agreements and further violations of the act. As usual, there was a prayer for general relief, but only such relief could be affored under that prayer as would be agreeable to the case made by the bill and consistent with that specifically prayed. And as to

the injunction asked, that relief was ancillary to and in aid of the primary equity, or ground of suit, and, if that failed, would fall with it. That ground here was the existence of contracts to monopolize interstate or international trade or commerce, and to restrain such trade or commerce, which, by the provisions of the act, could be rescinded, or operations thereunder arrested. * * * *

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. * * * *

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and effects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. * * * *

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. This was so ruled in Coe *v.* Errol, 116 U. S., 517, 525. * * * *

In Kidd *v.* Pearson, 128 U. S., 1, 20, 21, 24, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact

that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation —the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * * If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. * * * * The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer con-

templated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see Veazie *v.* Moor, 14 How. 568, 574. * * * *

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however, inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that

trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indictate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restrain of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree. *Decree affirmed.*

NORTHERN SECURITIES COMPANY *v.* UNITED STATES

193 U. S., 197. 1903.

Suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin, and other co-defendants. The object of the proceeding was to enforce against the defendants the provisions of the act of July 2, 1890, known as the "Anti-Trust Act."

The stockholders of the Great Northern and Northern Pacific Railway Companies, corporations with competing and practically parallel railway lines extending from the Great Lakes to Puget Sound, had organized the Northern Securities Company, as a holding company for the shares of stock of the two competing companies. The plan of combination was to transfer to the Securities Company the shares of stock of the constitutent companies, and the stockholders of each company were to receive in return upon an agreed basis of value shares of the holding company. In this way, the Northern Securities Company became the holder and custodian of more than nine-tenths of Northern Pacific Company stock, and three-fourths of Great Northern Company stock.

The United States charged that the combination was in violation

of the Anti-Trust law, in that it prevented free competition among carriers engaged in interstate commerce, and that it was a conspiracy to monopolize trade and commerce among the several States.

The United States Circuit Court in Minnesota sustained the contention of the government. An appeal was then taken to the Supreme Court of the United States.

MR. JUSTICE HARLAN delivered the opinion of the court:—

Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constitutent companies; so much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination under which the competition between the constituent companies would cease. * * * No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise. * * * in restraint of commerce among the several States or with foreign nations,"—or could more effectively and certainly suppress free competition between the constitutent companies. This combination is, within the meaning of the act, a "trust;" but if not, it is a combination in restraint of interstate and international commerce, and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such a combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, organized in a State distant from the people of that territory. * * * *

Judgment of lower court is affirmed.

PAUL *v.* VIRGINIA.

8 WALLACE, 168. 1868.

A statute of Virginia enacted that insurance companies of other States, must before issuing policies in Virginia, take out a license

and deposit with the State Treasurer bonds to a large amount. Paul, the agent of several New York companies, was convicted of writing insurance without having complied with this statute. He appealed from decision of the highest State court sustaining his convicition to the Supreme Court of the United States.

Paul claimed among other things that the Virginia statute, so far as his transactions were concerned, was void as a regulation of interstate commerce.

MR. JUSTICE FIELD delivered the opinion of the court.

"It is undoubtedly true...that the power conferred upon Congress to regulate commerce, includes as well commerce carried on by corporations as commerce carried on by individuals.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations, to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like personal contracts between parties which are completed by their signature and the transfer of consideration: Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. * * * *

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be

Affirmed.

CHAMPION *v.* AMES.

188 U. S., 321. 1902.

The Act of Congress of March 2, 1895, prohibited the carriage of lottery tickets in the United States mails or in interstate commerce, and made it an punishable offense to introduce such tickets in the mails or in interstate commerce. Champion violated the act by depositing a box containing two lottery tickets with the Wells-Fargo Express Co., to be carried from Dallas, Texas, to Fresno, Cali-

fornia, for which offense he was indicted under the act. Thereupon he sued out a writ of *habeas corpus* in the Circuit Court for the Northern District of Illinois, upon the theory that the act of 1895, under which it was proposed to try him was void, under the Constitution of the United States, as it concerned a matter over which Congress had no authority. The Circuit Court denied him the writ of *habeas corpus,* whereupon he appealed the case to the Supreme Court of the United States.

MR. JUSTICE HARLAN delivered the opinion of the majority of the court.

"It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asunion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the comany would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign country represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if the holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. * * * * We are of the opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States. * * * * That under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution on the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character is not consistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment of Circuit Court quashing the writ of *habeas corpus* must be, *Affirmed.*

3. When Commerce is Interstate or Foreign.

COE *v.* ERROL.

116 U. S., 517. 1885.

Coe was the owner of certain logs which had been cut in New Hampshire and were deposited on the banks of the Androscoggin River in the town of Errol, N. H., to be floated down stream into Maine when a convenient opportunity should arrive. The Androscoggin River starts in Maine, but, after running a distance through that State, crosses the line and runs a distance through the State of New Hampshire, and then back into the State of Maine. Coe owned certain other logs which had been cut in Maine and were being floated down this stream in New Hampshire to Lewiston, Maine, but were detained on account of low water at Errol. The town officials of Errol assessed a certain tax on all these logs while they thus remained in the town. Coe filed a petition in the State court to have the tax abated. The State court abated the tax as far as it affected the logs which had floated down the stream from Maine and were on their way to Lewiston. Coe appealed the case to the United States Supreme Court on the ground that the tax was an interference with interstate commerce.

Mr. Justice Bradley delivered the opinion of the court.

"Are the products of a State though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State?

Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation. This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time by low water or other causes of delay, as was the case with the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to

the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without discrimination, in the usual way and manner in which such property is taxed in the State.

* * * *

The application of these principles to the present case is obvious. The logs which were taxed, and the tax on which was not abated by the Supreme Court of New Hampshire, had not, when so taxed, been shipped or started on their final voyage or journey to the State of Maine. They had only been drawn down from Wentworth's location to Errol, the place from which they were to be transported to Lewiston in the State of Maine. There they were to remain until it should be convenient to send them to their destination. They come precisely within the character of property which, according to the principles herein laid down, is taxable.

The judgment of the Supreme Court of New Hampshire is

Affirmed.

BROWN *v.* HOUSTON.

114 U. S., 622. 1885.

The plaintiffs, citizens and residents of Pennsylvania, shipped coal in barges from Pittsburg to New Orleans. The coal remained in the barges on the Mississippi for some time after its arrival in New Orleans. A statute of Louisiana passed in 1880, provided that a certain tax should be levied on all property within the State. Under this act the State officers attempted to collect a tax on the plaintiffs' coal while yet it lay unsold in the barges. The plaintiffs sought by injunction to restrain the enforcement of the tax on the ground that their coal still retained its character of interstate commerce and therefore could not be taxed by the State. The judgment of the Supreme Court of Louisiana was in favor of the State's right to tax these goods. The plaintiffs then appealed the case to the Supreme Court of the United States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

In aproaching the consideration of the case we will first take up the last objection raised by the plaintiff in error, namely, that the tax was a duty on imports and exports.

It was decided by this court in the case of Woodruff *v.* Parham, 8 Wall. 123, that the term "imports," as used in that clause of the Constitution which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," does not refer to articles carried from one State into another, but only to articles imported from foreign countries into the United States. In that case the City of Mobile had by ordinance, passed in

pursuance of its charter, authorized the collection of a tax on real and personal estate, sales at auction, and sales of merchandise, capital employed in business and income within the city. Woodruff and others were auctioneers, and were taxed under this ordinance for sales at auction made by them, including sales of goods, the product of other States than Alabama, received by them as consignees and agents, and sold in the original and unbroken packages; but as the ordinance made no discrimination between sales at auction of goods produced in Alabama and goods produced in other States, the court held that the tax was not unconstitutional. A contrary result must have been reached under the ruling in Brown v. Maryland, 12 Wheat. 419, 449, if the constitutional prohibition referred to had been held to include imports from other States as well as imports from foreign countries; for, at the time the tax was laid, the condition of the goods, in reference to their introduction into the State, was precisely the same in one case as in the other. This court, however, after an elaborate examination of the question, held that the terms "imports" and "exports" in the clause under consideration had reference to goods brought from or carried to foreign countries alone, and not to goods transported from one State to another.

The other assumption made under that assignment, that some of the coal was afterwards exported, and that the tax complained of was therefore *pro tanto* a duty on exports, is equally untenable. When the petition was filed the coal was lying in New Orleans, in the hands of Brown & Jones, for sale. The petition states this in so many words, and Rootes testifies the same thing, and adds that it was to be sold by the flat-boat load. He also adds that at the time of his examination more than half of it had been exported to foreign countries; but he probably means that it had been sold to steamers sailing to foreign ports for use on the same, and had only been exported in that way. The complainants were not exporters; they did not hold the coal at New Orleans for exportation, but for sale there. Being in New Orleans, and held there on sale, without reference to the destination or use which the purchasers might wish to make of it, it was taxed in the hands of the owners (or their agents) like all other property in the city, six mills on the dollar. If after this, and after being sold, the purchaser thought proper to put it on board of a steamer bound to foreign parts, that did not alter the character of the taxation so as to convert it from a general tax to a duty on exports. When taxed it was not held with the intent or for the purpose of exportation, but with the intent and for the purpose of sale there, in New Orleans. A duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation. Whether the last would be a duty on exports, it is not necessary to determine. But certainly, where a general tax is laid on all property alike, it cannot be construed as a duty on exports when falling upon goods not then intended for exportation, though they should hap-

pen to be exported afterwards. This is the most that can be said of the goods in question, and we are therefore of opinion that the tax was not a duty on exports any more than it was a duty on imports, within the meaning of those terms in the clause under consideration.

But in holding, with the decision in Woodruff *v.* Parham, that goods carried from one State to another are not imports or exports within the meaning of the clause which prohibits a State from layiny any impost or duty on imports or exports, we do not mean to be understood as holding that a State may levy import or export duties on goods imported from or exported to another State. We only mean to say that the clause in question does not prohibit it. Whether the laying of such duties by a State would not violate some other provision of the Constitution, that, for example, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes, is a different question. This brings us to the consideration of the second assignment of error, which is founded on the clause referred to.

The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power; if, in the absence of Congressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, etc., still, according to the rule laid down in Cooley *v.* Board of Wardens of Philadelphia, 12 How. 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation; and is certainly so far exclusive that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisidiction. All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that commerce shall be free and untrammelled; and any regulation of the subject by the States is repugnant to such freedom. * * * * In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

This being the recognized law, the question then arises whether the assessment of the tax in question amounted to any interference with, or restriction upon the free introduction of the plaintiffs' coal from the State of Pennsylvania to the State of Louisiana, and the

free disposal of the same in commerce in the latter State; in other words, whether the tax amounted to a regulation of, or restriction upon, commerce among the States; or only to an exercise of local administration under the general taxing power, which, though it may incidentally affect the subjects of commerce, is entirely within the power of the State until Congress shall see fit to interfere and make express regulations on the subject.

As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the State, and as such it was taxed for the current year (1880), as all other property in the City of New Orleans was taxed. Under the law, it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. It cannot be seriously contended, at least in the absence of any congressional legislation to the contrary, that all goods which are the product of other States are to be free from taxation in the State to which they may be carried for use or sale. Take the City of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grainfields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital—provided always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other States? Of course, the assessment should be a general one, and not discriminative between goods of different States. The taxing of goods coming from other States, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce, inconsistent with that perfect freedom of trade which Congress has seen fit should remain undisturbed. But if, after their arrival within the State,—that being their place of des-

tination for use or trade,—if, after this, they are subjected to a general tax laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to. * * * *

When Congress shall see fit to make a regulation on the subject of property transported from one State to another, which may have the effect to give it a temporary exemption from taxation in the State to which it is transported, it will be time enough to consider any conflict that may arise between such regulation and the general taxing laws of the State. In the present case we see no such conflict, either in the law itself or in the proceedings which have been had under it and sustained by the State tribunals, nor any conflict with the general rule that a State cannot pass a law which shall interfere with the unrestricted freedom of commerce between the States.

In our opinion, therefore, the second assignment of error is untenable.

The judgment of the Supreme Court of Louisiana is *Affirmed.*

THE DANIEL BALL.

10 WALLACE, 557. 1870.

An Act of Congress of July 7, 1838, provided that the owner, master or captain of any vessel propelled by steam transporting merchandise or passengers upon "the bays, lakes, rivers or other navigable waters of the United States" must obtain a license. A penalty was imposed for a failure to observe the statute. A later statute of August 30, 1852, provided for the inspection of such vessels. In March, 1868, the Daniel Ball, a vessel propelled by steam was engaged in navigating the Grand River in the State of Michigan between the cities of Grand Rapids and Grand Haven, both of which were in the State of Michigan, and in the transportation of merchandise and passengers between those places; without having been licensed or inspected under the laws of the United States. An action was brought by the United States in the District Court for the Western District of Michigan to recover the penalty provided for want of such inspection and license. It was contended that the Grand River was a navigable water of the United States; and in addition to the employment stated above, that the steamer transported merchandise destined for ports and places other than the State of Michigan, and was thus engaged in commerce between the States. The owners of the vessel defended that the Grand River was not a navigable river, that the steamer was engaged solely in domestic commerce and that she was not subject to the navigation laws of the United States.

The District Court dismissed the action. The Circuit Court reversed this decision, and gave a decree for the penalty demanded. From this decree the case was brought by appeal to the Supreme Court of the United States.

MR. JUSTICE FIELD delivered the opinion of the court:

Two questions are presented in this case for our determination.

First: Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and,

Second: Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State.

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power. * * * *

But it is contended that the steamer Daniel Ball was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market. We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation.

Decree of the Circuit Court is *Affirmed.*

LORD *v.* STEAMSHIP COMPANY.

102 U. S., 541. 1881.

The steamship Ventura was employed in navigation between San Francisco and San Diego, both in the State of California, touching also at intermediate ports on the coast in said State. She neither took on or put off goods outside of the State of California, in making her voyage passed out upon the Pacific Ocean, out of the waters of the State of California and in again. While on a regular voyage she was totally lost with all her cargo and in a suit brought against her owner to recover the value of the goods lost, the steamship company pleaded an exemption from liability under an act of Congress relating to interstate and foreign commerce and it therefore became important to determine whether she was engaged in foreign or intrastate commerce. The lower court gave judgment for the steamship company whereupon an appeal was taken to the United States Supreme Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the Ventura carried goods from place to place in California, her voyages were always ocean voyages. * * * *

The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the Ventura went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress. *Judgment affirmed.*

GLOUCESTER FERRY COMPANY *v.* PENNSYLVANIA.

114 U. S., 196. 1885.

The Gloucester Ferry Company was incorporated in 1865 under the laws of the State of New Jersey to establish a steamboat ferry from the town of Gloucester, New Jersey, to the City of Philadel-

phia, Pennsylvania. It established and has maintained such a ferry, and has at the places named a slip or dock on which passengers and freight are received and landed. The dock in Philadelphia is leased. The one in Gloucester is owned by the company. A statute of Pennsylvania, passsd June 7, 1879, provided in substance that any company or association incorporated in Pennsylvania or elsewhere and doing business within the State should pay annually a tax computed upon its capital stock according to the dividends declared. The Court of Common Pleas of Philadelphia held that the tax could not be lawfully levied upon the company as the landing of passengers and freight was the only business carried on by the company in the State and was protected by the Constitution from State legislation as interstate commerce. The Supreme Court of Pennsylvania on appeal decided in favor of the tax, and to review this judgment an appeal was taken to the Supreme Court of the United States.

MR. JUSTICE FIELD delivered the opinion of the court.

* * * * As to the first reason thus expressed, it may be answered that the business of landing and receiving passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed, is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation. * * * * Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions.

Judgment of the Supreme Court of Pennsylvania is reversed.

Sub-Section B.

Extent of the Power of the States over Commerce.

1. THE STATE TAXING POWER AS AFFECTING COMMERCE.

BROWN *v.* MARYLAND.

12 WHEATON, 419. 1827.

A statute of Maryland, passed in 1821, provided that all importers of foreign commodities or articles and persons selling the same

by wholesale, bale or package, hogshead, barrel, or tierce should, before being authorized to sell the same take out a license for which they should pay fifty dollars. In case of neglect or refusal to pay the license, a heavy penalty was imposed by the statute. Brown was charged with having imported and sold one package of foreign dry goods without having a license to do so. He was fined by the State court and the Court of Appeals upheld the lower court. An appeal was taken to the Supreme Court of the United States on the ground that the legislature of a State could not constitutionally require the importer of foreign articles to take out a license before being permitted to sell a bale or package so imported.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court:—

The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.
* * * *

What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The

succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition. * * * *

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No objection of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by imposts, so far as it is drawn from importations

into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground. * * * *

The counsel for the State of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remain-

ing the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried overland for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way. * * * *

We think then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which

declares, that "no State shall lay any impost or duties on imports or exports."

Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object in the attainment of which the American public took, and justly took that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of Gibbons *v.* Ogden, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior. * * * *

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has

a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell? * * * *

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the Act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since, an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation. * * * *

We think there is error in the judgment of the Court of Appeals of the State of Maryland imposing the penalty.

Judgment is reversed.

ROBBINS *v.* SHELBY COUNTY TAXING DISTRICT.

120 U. S., 489. 1886.

Robbins, the defendant in the lower court, was engaged in soliciting sales of goods in the city of Memphis, Tennessee, for the firm of Rose, Robbins & Co., of Cincinnati, Ohio, and in obtaining orders, he exhibited samples of the goods,—an employment usually denominated as that of a "drummer." A statute of Tennessee, relating to taxation, provided "that drummers, and all persons not having a regular licensed house of business in the taxing district offering for sale or selling goods, wares or merchandise by sample shall be required to pay to the county trustee the sum of $10 per week, or $25 per month for such privilege, and no license shall be issued for a longer period than three months." The statute further provided for a fine and imprisonment in case of the violation of the act. Under this law Robbins, who had not paid the tax, was convicted and sentenced to pay a fine. The Supreme Court of the State held that the statute was constitutional and affirmed the judgment of the lower court. An appeal was then taken to he United States Supreme Court on the ground that the statute was repugnant

to the clause of the Constitution giving to Congress the power to regulate commerce among the several States.

MR. JUSTICE BRADLEY delivered the opinion of the court.

"The principal question argued before the Supreme Court of Tennessee was as to the constitutionality of the act which imposed the tax on drummers; and the court decided that it was constitutional and valid.

That is the question before us, and it is one of great importance to the people of the United States, both as it respects their business interests and their constitutional rights. It is presented in a nutshell, and does not, at this day, require for its solution any great elaboration of argument or review of authorities. Certain principles have been already established by the decisions of this court which will conduct us to a satisfactory decision. Among those principles are the following:

1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation.

2. Another established doctrine of this court is that where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom.

3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulations of highways, canals, railroads, wharves, ferries, and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from

another State, and not yet become part of the common mass of property therein; and no discrimination can be made, by any such regulations, adversely to the persons or property of other States; and no regulations can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject. * * * *

In a word, it may be said that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject.

In view of these fundamental principles, which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer, or a merchant, of one State, to sell his goods in another State, without, in some way, obtaining orders therefor? Must he be compelled to send them, at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or wooden ware, may, perhaps, safely take his goods to the city of New York and be sure of finding a staple and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or a store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business, it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States? Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

The only other way, and the one, perhaps, which most extensive-

ly prevails, is to obtain orders from persons residing or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly and without due attention to the truth of things.

It may be suggested that the merchant or manufacturer has the post-office at his command, and may solicit orders through the mails. We do not suppose, however, that any one would seriously contend that this is the only way in which his business can be transacted without being amenable to exactions on the part of the State. Besides, why could not the State to which his letters might be sent, tax him for soliciting orders in this way, as well as in any other way?

The truth is, that, in numberless instances, the most feasible, if not the only practicable, way for the merchant or manufacturer to obtain orders in other States is to obtain them by personal application, either by himself, or by some one employed by him for that purpose; and in many branches of business he must necessarily exhibit samples for the purpose of determining the kind and quality of the goods he proposes to sell, or which the other party desires to purchase. But the right of taxation, if it exists at all, is not confined to selling by sample. It embraces every act of sale, whether by word of mouth only, or by the exhibition of samples. If the right exists, any New York or Chicago merchant visiting New Orleans or Jacksonville, for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license. The right to tax would apply equally as well to the principal as to his agent, and to a single act of sale as to a hundred acts. * * * *

It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers —those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State. This was decided in the case of The State Freight Tax, 15 Wall. 232. The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods from London or New York, because, in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress alone.

It would not be difficult, however, to show that the tax authorized by the State of Tennessee in the present case is discriminative against the merchants and manufacturers of other States. They can only sell their goods in Memphis by the employment of drummers

and by means of samples; whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true; but so, it is presumable, are the merchants and manufacturers of other States in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a State can, in this way, impose restrictions upon interstate commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it.

The judgment of the Supreme Court of Tennessee is reversed, and the plaintiff in error discharged.

MAINE *v.* GRAND TRUNK RAILWAY COMPANY.

142 U. S., 217. 1891.

The State of Maine in 1881 passed a statute providing that every corporation operating a railroad in the State was to pay an annual franchise tax for the privilege of exercising its franchises in the State. The amount of the tax to be paid was to be determined by the amount of the corporation's gross transportation receipts. The act further provided that when applied to a railroad lying partly within and partly without the State, the tax should be assessed upon that proportion of the gross receipts which the number of miles of the railroad in the State bore to the whole number of miles of railroad operated by the corporation. The lines of the Grand Trunk Railway Company were partly within and partly without the State of Maine and the railway company resisted the payment of the tax on the ground that it was void as a regulation of interstate commerce. The State of Maine brought an action in its own courts to recover the amount of the tax assessed upon the Grand Trunk Railway Company, but on application of the defendant railway the case was transferred to the Circuit Court of the United States, which court held that this tax was a regulation of interstate commerce and gave judgment for the defendant railway, whereupon the State took an appeal to the United States Supreme Court.

MR. JUSTICE FIELD delivered the opinion of the court.

The privilege of exercising the franchises of a corporation with-

in a State is generally one of value, and often of great value, and the subject of earnest contention. It is natural, therefore, that the corporation should be made to bear some proportion of the burdens of government. As the granting of the privilege rests entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its jdugment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts of the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. * * * * The rule of apportioning the charge to the receipts of the business would seem to be eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation.

The court below held that the imposition of the taxes was a regulation of commerce, interstate and foreign, and therefore in conflict with the exclusive power of Congress in that respect; and on that ground alone it ordered judgment for the defendant. This ruling was founded upon the assumption that a reference by the statute to the transportation receipts and to a certain percentage of the same in determining the amount of the excise tax, was in effect the imposition of the tax upon such receipts, and therefore an interference with interstate and foreign commerce. But a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied; and we are unable to perceive in that resort any interference with transportation, domestic or foreign, over the road of the railroad company, or any regulation of commerce which consists in such transportation.

Reversed, and cause remanded with directions to enter judgment in favor of the State for the amount of taxes demanded.

LEHIGH VALLEY RAILROAD COMPANY *v.* PENNSYLVANIA.

145 U. S., 192. 1891.

The Lehigh Valley Railroad Company, a Pennsylvania corporation, has no line of its own to Philadelphia. For the traffic from Mauch Chunk, Pa., to Philadelphia, Pa., it makes use of its own line to Phillipsburg, New Jersey, connecting with the lines of the Pennsylvania Railroad at that point, and thence via Trenton, in that State, to Philadelphia. By the running arrangements between the Lehigh and Pennsylvania companies, the transportation of through freight and passengers is continuous from Mauch Chunk to

Philadelphia. Under the act of June 7, 1879, the State of Pennsylvania taxed the gross receipts of railroads doing business in the State. In levying the tax on the Lehigh Valley Railroad Company, only such portion of its gross receipts was taxed, as the number of miles of its road in the State bore to the whole number of miles of road owned by the company. (This was in accord with the provisions of the act). The Lehigh Valley Railroad Company resisted payment of the tax so far as it was computed on the continuous transportations from Mauch Chunk to Philadelphia, on the ground those transportations were transactions of interstate commerce. The Supreme Court of Pennsylvania gave judgment in favor of the State against the railroad for the recovery of the taxes assessed, whereupon the railroad appealed to the United States Supreme Court.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The tax under consideration here was determined in respect of receipts, for the proportion of the transportation within the State, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another State than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line on to the soil of another State?

If it has happened that through engineering difficulties, as the interposition of a mountain or a river, the line is deflected so as to cross the boundary and run for the time being in another State than that of its principal location, does such detour in itself impress an external character on internal intercourse?

It should be remembered that the question does not arise as to the power of any other State than the State of the termini, nor as to taxation upon property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, but is simply whether, in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another State renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk.

Judgment of the State court sustaining the validity of the tax

Affirmed.

HANLEY V. KANSAS CITY SOUTHERN RAILWAY COMPANY

187 U. S., 617. 1902.

Goods were transported on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, over the Kansas City Southern Railway, by way of Spiro in the Indian Territory, a distance of 116 miles, of which 52 miles are in Arkansas and 64 in the Indian erritory. For this transportation the railroad company charged a sum in excess of the rate fixed by the railroad commissioners of Arkansas. The Commissioners decided that the company was liable to a penalty under the State statute, and asserted their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the State. The railroad company then brought a bill in equity in the Circuit Court against the Commissioners seeking an injunction against their fixing these rates.

The Circuit Court decided in favor of the Railroad Company and granted the injunction. The Commissioners then appealed to the United States Supreme Court. The question raised is whether this transportation was a transaction of interstate or intrastate commerce. It was admitted that if it was interstate, then the State commissioners would not have the right to fix the rates.

Mr. Justice Holmes delivered the opinion of the court.

"It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States. * * *

The transportation of these goods certainly went outside of Arkansas, and we are of the opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not."

(The Court distinguishes this case from Lehigh Valley Railroad Company v. Pennsylvania, 145 U. S. 192, on the ground that that was the case of a tax and was different from an attempt by a State directly to regulate the transportation while outside its borders.

Decree of the Circuit Court affirmed.

STATE TONNAGE TAX CASES.

12 WALLACE, 204. 1870.

The State of Alabama passed a statute on February 22, 1866, imposing a tax "on all steamboats, vessels, and other water crafts

plying in the navigable waters of the State. * * * * at the rate of $1 per ton of the registered tonnage thereof." The question in these cases was whether this statute conflicted with the clause of the Consitution of the United States ordaining that "no State shall without the consent of Congress lay any duty of tonnage."

MR. JUSTICE CLIFFORD delivered the judgment of the court.

The word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of 100 cubical feet each.

Taxes levied by a State upon ships and vessels owned by citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instruments which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general. * * * * The court is of the opinion that the State law levying the taxes in this case is unconstitutional and void.

2. STATE POLICE POWER AS AFFECTING COMMERCE.

WILLSON *v.* BLACKBIRD CREEK MARSH COMPANY.

2 PETERS, 245. 1829.

A statute of the State of Delaware authorized the Blackbird Creek Marsh Company to erect a dam on Blackbird Creek, a navigable stream wholly within the State. By this dam property along the stream was improved, but it blocked the river and stopped navigation. Willson and others owned a sloop, regularly enrolled under an act of Congress and licensed to carry on the coasting trade. The owners of the sloop destroyed the dam in getting their boat up the creek. The company then sued them for trespass. The owners of the sloop sought to justify their act on the theory that the Blackbird Creek being a navigable stream, was a highway of interstate commerce and therefore the State statute permitting the company to dam it conflicted with the act of Congress, under which they were licensed. The highest court of the State gave judgment in favor of the company, whereupon an appeal was taken to the United States Supreme Court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many

creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgement, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States."

If Congress had passed any act which bore upon the case—any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States—we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is *Affirmed.*

COOLEY *v.* BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

12 HOWARD, 299. 1851.

These cases were brought to the United States Supreme Court by writs of error to the Supreme Court of Pennsylvania. They are actions to recover half-pilotage fees collected under a law of the State of Pennsylvania, passed March, 1803, providing that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the master warden of the pilots, for the use of the Society for the Relief of Distressed Pilots, one-half the regular amount of pilotage. The Supreme Court of Pennsylvania sustained the validity of the fees. One of the grounds of error assigned is that the State law above referred to controvenes the commerce clause of the Constitution of the United States. (Art. 1, Sec. 8, Clause 3).

MR. JUSTICE CURTIS delivered the opinion of the court.

"That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. * * * *

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." * * * *

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded, it must be because the nature of the power, thus

granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32), and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. * * * *

Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage, is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience,

and conformed to local wants. How, then, can we say that by the mere grant of power to regulate commerce the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. This would be to affirm that the nature of the power is in this case something different from the nature of the subject to which in such case the power extends, and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive, by affirming of the power what is not true of the subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. * * * *

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing State laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot

legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this State law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

M'LEAN, J., and WAYNE, J., dissented; and DANIEL, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

LEISY *v.* HARDIN.

135 U. S., 100. 1890.

The plaintiffs, residents of Illinois, shipped a certain quality of beer to Iowa to be sold there in its original packages. (122 one-quarter barrels, 171 one-eighth barrels and 11 sealed cases). The beer was seized under an Iowa statute which forbade the sale of liquor except for medicinal purposes. This action was brought originally in the Superior Court of Keokuk, Iowa, which court awarded to plaintiffs the return of the property. This judgment was reversed by the Supreme Court of Iowa, whereupon the decision was brought to the United States Supreme Court for review.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which the commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. Gibbons *v.* Ogden, 9 Wheat. 1; Brown *v.* Maryland, 12 Wheat. 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. Henderson *v.* Mayor of New York, 92 U. S., 259. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress

otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws and laws in relation to bridges, ferries and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity and to the protection, the safety and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley *v.* Port Wardens, 12 How. 299. * * * *

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary. the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State, or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In Brown *v.* Maryland, the act of the State legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon

imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the Federal Govrnmnt contributed more to the great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any aricle imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story, Constitution, § 1066. And although the precise question before us was not ruled in Gibbons *v.* Ogden and Brown *v.* Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman *v.* Chicago & Northwestern Railway Co., 125 U. S., 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument

of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the Federal Government. * * * *

The doctrine now firmly established is, as stated by Mr. Justice Field, in Bowman *v.* Chicago, &c. Railway Co., 125 U. S., 507, "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it,

except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. * * * *

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In Mugler *v.* Kansas, the court said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the Legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. * * * * Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly, it is for the legislative branch of the State governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have

not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action. * * * *

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman *v.* Chicago, &c. Railway Co., they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat. 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art 1 of the Consitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

AUSTIN *v.* TENNESSEE.

179 U. S., 343. 1900.

The State of Tennessee forbade the sale of cigarettes within the State under the following act of 1897, "It shall be a misdemeanor

for any person, firm or corporation to sell, offer to sell, or bring into the State for the purpose of selling, giving away or otherwise disposing of any cigarettes, cigarette paper, or substitute for the same." * * * *

Austin was convicted of a violation of the statute and committed to jail until payment of a fine. The facts of the case showed that the defendant had purchased a lot of cigarettes from the American Tobacco Company, in Durham, North Carolina, where the same had been manufactured and put into pasteboard boxes containing ten cigarettes each, properly marked, stamped and labeled as prescribed by the United States revenue laws. That after the purchase, the American Tobacco Company piled upon the floor of its warehouse, in Durham, the number of boxes or packages sold and notified the Southern Express Company to come and get them. The express company placed them in an open basket and delivered them to the defendant in Tennessee. The defendant sold one of the packages of ten cigarettes without breaking it. The Supreme Court of Tennessee upheld the conviction on the ground that (1) Cigarettes were not legitimate articles of commerce. (2) The packages in which the cigarettes were sold were not original packages in the true commercial sense. Appeal to the Supreme Court of the United States.

MR. JUSTICE BROWN delivered the opinion of the court:—

It is charged that the act in question, in its application to the facts of the case, is an infringement upon the exclusive power of Congress to regulate commerce between the States. This is the sole question presented for our determination. We are not disposed to question the general principle that the States cannot, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless, or otherwise burden foreign or interstate commerce by regulations adopted under the assumed police power of the State, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. We are not prepared to fully indorse the opinion of the court, upon the first point. Whatever product has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of Federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce although it may to a certain extent be within the police power of the States. Of this class of cases is tobacco. From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community * * * there is no reason to doubt the good faith of the legislature of Tennessee

in prohibiting the sale of cigarettes as a sanitary measure, and if it be inoperative as applied to sales by the owner in the original packages, of cigarettes manufactured in and brought from another State, we are remitted to the inquiry whether a paper package of three inches in length and one and one-half inches in width, containing ten cigarettes is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer? The real question in this case is whether the size of the package in which the importation is actually made is to govern; or, the size of the package in which bona-fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States. We hold to the latter view. The whole theory of the exemption of the original package from the operation of State laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country.* * * And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. We can only look upon it as a discreditable subterfuge, to which this court ought not to lend its countenance. If there be any original package at all in this case, we think it is the basket and not the paper box. We are satisfied the conclusion of the Supreme Court of Tennessee correct and it is therefore *Affirmed.*

SCHOLLENBERGER *v.* PENNSYLVANIA.

171 U. S., 1. 1898.

Schollenberger with others was convicted of a violation of a statute of Pennsylvania, Act May 21, 1885, which prohibited the sale of oleomargarine. From the evidence it appeared that Schollenberger was the agent in Pennsylvania for the sale of the prodduct on behalf of a manufacturer in Rhode Island. Also, the manufacturer and agent, had complied with the provisions of the act of Congress of August 2, 1886, imposing a tax upon the business. A tub containing forty pounds of oleomarmargarine, packed, stamped and branded as required by the act of Congress was shipped to Schollenberger from Rhode Island, who sold the same to a purchaser, as an article of food. The Supreme Court of Pennsylvania upheld the constitutionality of the statute on the ground that it was a legitimate exercise of the police power of the State in protecting the health of its citizens; also, that the statute did not prevent oleomargarine being brought within-the state and sold to the wholesale dealer in original packages, but affected only its retail sale. An appeal was taken to the Supreme Court of the United States.

MR. JUSTICE PECKHAM delivered the opinion:

In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No

affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

Any legislation of Congress upon the subject must, of course, be regarded by this court as a fact of the first importance. If Congress has affirmatively pronounced the article to be a proper subject of commerce, we should rightly be influenced by that declaration. By reference to the statutes we discover that Congress in 1886 passed "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine." Act of August 2, 1886, c. 840, 24 Stat. 209. In that statute we find that Congress has given a definition of the meaning of oleomargarine and has imposed a special tax on the manufacturers of the article, on wholesale dealers, and upon retail dealers therein and the provisions of the Revised Statutes in relation to special taxes are, so far as applicable, made to extend to the special taxes imposed by the third section of the act, and to the persons upon whom they are imposed. Manufacturers are required to file with the proper collector of internal revenue such notices, and keep such books and conduct their business under such supervision as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require. Provision is made for the packing of oleomargarine by the manufacturer in packages containing not less than ten pounds and marked as prescribed in the act, and it provides that all sales made by manufacturers of oleomargarine and wholesale dealers in oleomargarine shall be in the original stamped packages. A tax of two cents per pound is laid upon oleomargarine, to be paid by the manufacturer, and the tax levied is to be represented by coupon stamps. Oleomargarine imported from foreign countries is taxed, in addition to the import duty imposed on the same, an internal revenue tax of fifteen cents per pound. Provision is made for warehousing, and a penalty imposed for selling the oleomargarine thus imported if not properly stamped. Provision is also made for the appointment of an analytical chemist and microscopist by the Secretary of the Treasury, and such chemist or microscopist may examine the different substances which may be submitted in contested cases, and the Commissioner of Internal Revenue is to decide in such cases as to the taxation, and his decision is to be final. * * * *

This act shows that Congress at the time of its passage in 1886 recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and of importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself. * * * *

Upon all these facts we think it apparent that oleomargarine has become a proper subject of commerce among the States and with foreign nations.

The general rule to be deduced from the decisions of this court is that a lawful article of commerce cannot be wholly excluded from importation into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food. * * * *

We do not think the fact that the article is subject to be adulterated by dishonest persons, in the course of its manufacture, with other substances, which it is claimed may in some instances become deleterious to health, creates the right in any State through its legislature to forbid the introduction of the unadulterated article into the State. The fact that the article is liable to adulteration in the course of manufacture, and that the articles with which it may be mixed may possibly and under some circumstances be deleterious to the health of those who consume it, is known to us by means of various references to the subject in books and encyclopædias, but there was no affirmative evidence offered on the trial to prove the fact. From these sources of information it may be admitted that oleomargarine in the course of its manufacture may sometimes be adulterated by dishonest manufacturers with articles that possibly may become injurious to health. Conceding the fact, we yet deny the right of a State to absolutely prohibit the introduction within its borders of an article of commerce, which is not adulaterated and which in its pure state is healthful, simply because such an article in the course of its manufacture may be adulterated by dishonest manufacturers for purposes of fraud or illegal gains. The bad article may be prohibited, but not the pure and healthy one. * * * *

We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package it is not necessary to here determine. We do say that a sale of a ten pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the State. Waring *v.* The Mayor, 8 Wall. 110, 122. The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid.

The right of the importer to sell cannot depend upon whether the original package is suitable for retail trade or not. His right to

sell is the same, whether to consumers or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the State to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the State law does really inspect and does not substantially prohibit the introduction of the pure article and thereby interfere with interstate commerce. It cannot for the purpose of preventing the introduction of an impure or adulterated article absolutely prohibit the introduction of that which is pure and wholesome. The act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another State and its sale in the original package, as described in the special verdict, is invalid.

The judgments are therefore reversed and the cases remanded to the Supreme Court of Pennsylvania for further proceedings not inconsistent with this opinion.

MINNESOTA *v.* BARBER.

136 U. S., 313, 1890.

Henry E. Barber was convicted of the offense of offering meat for sale in Minnesota in violation of a statute of the State passed April 16, 1889. The act of 1889 was entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep and swine designed for slaughter for human food." By the third section of the act it was declared to be the duty of the inspectors appointed under the act to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before the slaughter of the same, and if found healthy and in suitable condition to be slaughtered for human food to give to the applicant a certificate in writing to that effect. If found unfit for food, such inspectors were to order the immediate removal and destruction of such diseased animals. The fourth section made it a misdemeanor punishable by fine and imprisonment to expose or offer for sale any meat which had not been taken from an animal so inspected and certified before slaughter. Barber sued out a writ of *habeas corpus* to be released from jail in the Circuit Court of the United States for the District of Minnesota upon the ground that the act of 1889 was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States. The Circuit Court held the statute to be in violation of the Constitution and discharged the prisoner from custody. The State then appealed to the United States Supreme Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

As the inspection must take place within the twenty-four hours immediately before the slaughtering, the act, by its necessary oper-

ation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork—in whatever form, and although entirely sound, healthy, and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value—will be so great as to amount to an absolute prohibition upon sales in Minnesota, of meat from animals not slaughtered within its limits. When to this is added the fact that the statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from animals slaughtered outside of that State and to compel the people of Minnesota wishing to buy such meats, either to purchase those taken from animals slaughtered in the State, or to incur the cost of purchasing them, when desired for their own personal use, at points beyond the State, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result. * * * *

A law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the products of animals slaughtered in other States. It is one thing for a Sate to exclude from its limits cattle, sheep or swine, actually diseased, or meats that by reason of their condition, or the condition of the animal from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare

as does Minnesota by the necessary operation of its statute that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

In the opinion of the court the statute in question * * * is in violation of the Constitution and void.

Judgment discharging the appealee (Barber) from custody is affirmed.

SECTION III.

BILLS OF CREDIT.

BRISCOE *v.* BANK OF KENTUCKY.

11 PETERS, 257. 1837.

This was an action brought by the Bank of the Commonwealth of Kentucky against Briscoe and other persons upon a promissory note of $2,048.37, payable to the president and directors of the bank. On November 29, 1820, the legislature of Kentucky passed an act establishing the bank "in the name and on behalf of the Commonwealth of Kentucky" and declared it to be exclusively the property of the Commonwealth. A section of the bank's charter authorized it to issue notes to the amount of three million dollars. Briscoe defended to the suit on the ground that the promissory note had been given in return for the notes of the bank, which latter notes were void, as they were "bills of credit" issued by the State of Kentucky, in violation of the provisions of the Consitution of the United States, which prohibited a State from issuing bills of credit. Furthermore, he claimed that the act establishing the bank was unconstitutional and void. Therefore, since the consideration for the promissory note was illegal, there could be no recovery upon it. The Circuit Court of Mercer County, Kentucky, gave judgment in favor of the bank, which was affirmed by the Court of Appeals, the highest court in Kentucky. An appeal was then taken to the Supreme Court of the United States.

MR. JUSTICE M'LEAN delivered the opinion of the court.

The terms "bills of credit," in their mercantile sense, comprehend a great variety of evidences of debt, which circulate in a commercial country. In the early history of banks it seems their notes were generally denominated bills of credit; but in modern times they have lost that designation, and are now called either bank-bills, or bank-notes.

But the inhibition of the Constitution applies to bills of credit, in a more limited sense.

It would be difficult to classify the bills of credit which were is-

sued in the early history of this country. They were all designed to circulate as money, being issued under the laws of the respective colonies; but the forms were various in the different colonies, and often in the same colony.

In some cases they were payable with interest, in others without interest. Funds arising from certain sources of taxation were pledged for their redemption, in some instances; in others they were issued without such a pledge. They were sometimes made a legal tender; at others, not. In some instances a refusal to receive them operated as a discharge of the debt; in others, a postponement of it.

They were sometimes payable on demand; at other times, at some future period. At all times the bills were receivable for taxes, and in payment of debts due to the public, except, perhaps, in some instances, where they had become so depreciated as to be of little or no value.

These bills were frequently issued by committees, and sometimes by an officer of the government, or an individual designated for that purpose.

The bills of credit emitted by the States during the Revolution, and prior to the adoption of the Consitution, were not very dissimilar from those which the colonies had been in the practice of issuing. There were some characteristics which were common to all these bills. They were issued by the colony or State, and on its credit. For in cases where funds were pledged, the bills were to be redeemed at a future period, and gradually as the means of redemption should accumulate. In some instances, Congress guaranteed the payment of bills emitted by a State.

They were, perhaps, never convertible into gold and silver, immediately on their emission; as they were issued to supply the pressing pecuniary wants of the government, their circulating as money was indispensable. The necessity which required their emission precluded the possibility of their immediate redemption.

In the case of Craig *et al. v.* The State of Missouri, 4 Pet. 410, this court was called upon, for the first time, to determine what constituted a bill of credit, within the meaning of the Constitution. A majority of the judges in that case, in the language of the Chief Justice, say, that "bills of credit signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society."

A definition so general as this would certainly embrace every description of paper which circulates as money.

Two of the dissenting judges, on that occasion, gave a more definite, though, perhaps, a less accurate meaning, of the terms "bills of credit."

By one of them it was said, "a bill of credit may, therefore, be considered a bill drawn and resting merely on the credit of the drawer, as contradistinguished from a fund constituted or pledged for the payment of the bill." And in the opinion of the other, it is said, "to constitute a bill of credit, within the meaning of the Constitution, it must be issued by a State, and its circulation as money, enforced by

statutory provisions. It must contain a promise of payment by the State generally, when no fund has been appropriated to enable the holder to convert it into money. It must be circulated on the credit of the State; not that it will be paid on presentation, but that the State, at some future period, on a time fixed or resting in its own discretion, will provide for the payment."

These definitions cover a large class of the bills of credit issued and circulated as money, but there are classes which they do not embrace, and it is believed that no definition, short of a description of each class, would be entirely free from objection; unless it be in the general terms used by the venerable and lamented Chief Justice.

The definition, then, which does include all classes of bills of credit emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

Having arrived at this point, the next inquiry in the case is, whether the notes of the Bank of Commonwealth were bills of credit within the meaning of the Constitution. * * * *

A State cannot do that which the Federal Constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken. They are susceptible of but one construction. And it is certain that a State cannot incorporate any number of individuals, and authorize them to coin money. Such an act would be as much a violation of the Constitution as if the money were coined by an officer of the State, under its authority. The act being prohibited cannot be done by a State, either directly or indirectly.

And the same rule applies as to the emission of bills of credit by a State. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great differences of opinion as to the construction of the former. If the terms in each case were equally definite, and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other.

The weight of the argument is admitted, that a State cannot, by any device that may be adopted, emit bills of credit. But the question arises, what is a bill of credit within the meaning of the Constitution? On the answer of this must depend the constitutionality or unconsitutionality of the act in question.

A State can act only through its agents; and it would be absurd to say that any act was not done by a State, which was done by its authorized agents.

To constitute a bill of credit within the Constitution it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the ordinary business of life.

The individual or committee who issue the bill must have the power to bind the State; they must act as agents, and, of course, do

not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit which a State cannot emit. Were the notes of the Bank of the Commonwealth bills of credit issued by the State?

The president and directors of the bank were incorporated, and vested with all the powers usually given to banking institutions. They were authorized to make loans on personal security, and on mortgages of real estate. Provisions were made, and regulations, common to all banks; but there are other parts of the charter which, it is contended, show that the president and directors acted merely as agents of the State.

In the preamble of the act it is declared to be "expedient and beneficial to the State, and the citizens thereof, to establish a bank on the funds of the State, for the purpose of discounting paper, and making loans for longer periods than has been customary, and for the relief of the distresses of the community."

The president and directors were elected by the legislature. The capital of the bank belonged to the State, and it received the dividends.

These and other parts of the charter, it is argued, show that the bank was a mere instrument of the State to issue bills; and that, if by such a device the provision of the Constitution may be evaded, it must become a nullity.

That there is much plausibility and some force in this argument cannot be denied; and it would be in vain to assert that on this head the case is clear of difficulty. * * *

Were these notes issued by the State?

Upon their face they do not purport to be issued by the State, but by the president and directors of the bank. They promise to pay to bearer on demand the sums stated.

Were they issued on the faith of the State?

The notes contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the State; and the promise to pay on the face of the notes was made by the president and directors as agents of the State.

They do not assume to act as agents, and there is no law which authorized them to bind the State. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a State emits bills of credit the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the State, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the State. The capital, it is true, was to be paid by the State; but in making loans the bank was required to

take good securities, and these constituted a fund to which the holders of the notes could look for payment, and which could be made legally responsible.

In this respect the notes of this bank were essentially different from any class of bills of credit, which are believed to have been issued. * * * *

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it.

The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie.

What means of enforcing payment from the State has the holder of a bill of credit. It is said by the counsel for the plaintiffs that he could have sued the State. But was a State liable to be sued?

In the case of Chisholm's Executor *v.* The State of Georgia, in 1792, 2 Dal. 419, it was decided that a State could be sued before this court, and this led to the adoption of the amendment of the Constitution on this subject. But the bills of credit which were emitted prior to the Constitution are those that show the mischief against which the inhibition was intended to operate. And we must look to that period, as of necessity we have done, for the definition and character of a bill of credit. No sovereign State is liable to be sued without her consent. * * * It is believed that there is no case where a suit has been brought at any time on bills of credit against a State, and it is certain that no suit could have been maintained on this ground prior to the Constitution. In the case of the Bank of the Commonwealth of Kentucky *v.* Wistar and others, 3 Pet. 431, the question was raised whether a suit could be maintained against the bank, on the ground that it was substantially a suit against the State.

The agents of the defendants deposited a large sum in the bank; and when the deposit was demanded, the bank offered to pay the amount in its own notes, which were at a discount. The notes were refused, and a suit was commenced on the certificate of deposit.

A judgment being entered against the bank, in the Circuit Court of Kentucky, a writ of eror was brought to this court. In the court below the defendant pleaded to the jurisdiction, on the ground that the State of Kentucky alone was the proprietor of the stock of the bank; for which reason it was insisted that the suit was virtually against a sovereign State.

Mr. Justice Johnson, in giving the opinion of the court, after copying the language used in the case above quoted, says: "If a State did exercise any other power in or over a bank, or impart to it its sovereign attributes, it would be hardly possible to distinguish the issue of the paper of such banks from a direct issue of bills of credit; which violation of the Constitution, no doubt, the State here intended to avoid."

Can language be more explicit and more appropriate than this, to the points under consideration? * * * *

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the State, nor the agent of the State; if it possesses no more power than is given to it in the act of incorporation and precisely the same as if the stock were owned by private individuals,—how can it be contended that the notes of the bank can be called bills of credit, in contradistinction from the notes of other banks?

If, in becoming an exclusive stockholder in this bank, the State imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it,—how can it be said to emit bills of credit? Is it not essential, to constitute a bill of credit within the Constitution, that it should be emitted by a State? Under its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The State, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank, and its property of every description, are held responsible for the payment of its debts; and may be reached by legal or equitable process. In this respect it can claim no exemption under the prerogatives of the State.

And if, in the course of its operations, its notes have depreciated like the notes of other banks, under the pressure of circumstances, still, it must stand or fall by its charter. In this its powers are defined, and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky; and, consequently, that the notes issued by the bank are not bills of credit, within the meaning of the Federal Constitution. The judgment of the court of appeals is therefore affirmed, with interests and costs.

NOTE. The case of Briscoe *v.* Bank has been inserted because it contains an excellent explanation of the meaning of "bills of credit" from the standpoint of constitutional law. The Constitution expressly prohibits the States from emitting such bills. There is no express prohibition in the Constitution upon the power of Congress to emit bills of credit, and while the power to emit them is not in express terms given, still the Supreme Court has held that Congress does possess the implied power to emit bills of credit. See Veazie Bank *v.* Fenno, page 57, and Legal Tender Cases, page 143.

SECTION IV.

POWER OF CONGRESS OVER THE CURRENCY.

The Legal Tender Cases.

HEPBURN *v.* GRISWOLD.

8 WALLACE, 603. 1869.

In this case a certain Mrs. Hepburn made a promissory note, dated June 20, 1860, by which she promised to pay to one Henry Griswold on February 20, 1862, the sum of $11,250. There was at the time the note was made, and at the time it fell due no lawful money of the United States but gold and silver coin. The note was not paid at maturity, and on February 25, 1862, in a crisis of the nation, Congress authorized the issue of $150,000,000 of its own notes and enacted in regards to them "Such notes * * * shall also be lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, etc." These notes were issued on the credit of the United States alone. In March, 1864, suit was brought upon the note, Mrs. Hepburn tendered the United States notes issued under the act in satisfaction and payment of Griswold's claim. The tender was refused, and the money paid into court. On appeal from the State courts, the cause was brought into the United States Supreme Court.

CHIEF JUSTICE CHASE delivered the opinion of the court:

Applying the rule just stated (*i. e.*, that statutes shall be construed so as not to be unjust and inequitable, if another sense, consonant with those principles can be given to them), there appears to be strong reason for construing the word "debts" as having reference only to debts contracted subsequent to the enactment of the law. For no one will question that the United States notes, which the act makes a legal tender in payment, are essentially unlike in nature, and being irredeemable in coin, are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. * * * Contracts for the payment of money, made before the act of 1862, had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was in legal import, a contract for the payment of coin. (The court discusses the question whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable in gold and silver coin, and concludes the opinion as follows:) * * * We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution. We are obliged, therefore, to hold that the defendant (Griswold) was not bound to receive from the plaintiff the currency ten-

dered to him in payment of the note, made before the passage of the act of February 25, 1862.

LEGAL TENDER CASE.

JUILLIARD v. GREENMAN.

110 U. S., 421. 1883.

Julliard, a citizen of New York, brought suit against Greenman, a citizen of Connecticut, to recover the sum of $5,122.90 in payment of one hundred bales of cotton sold and delivered to Greenman, who admitted the purchase and delivery of the cotton, and the agreement to pay for them. He further stated that he had offered and tendered to the plaintiff, in payment of the debt, $22.50 in United States gold coin, forty cents in silver coin, and two United States notes, one of the denomination of $5,000, and the other of the denomination of $100. The two notes were known as United States legal tender notes. These notes were originally issued under the acts of Congress of 1862 and 1863, and reissued and kept in circulation under the act of Congress of May 31, 1878. The plaintiff had refused to take the notes, and contended that the defence was insufficient in law. The Circuit Court in New York gave judgment for the defendant. Appeal to the Supreme Court of the United States.

MR. JUSTICE GRAY delivered the opinion of the court.

"The notes of the United States, tendered in payment of the defendant's debt to the plaintiff, were originally issued under the acts of Congress of February 25, 1862, ch. 33, July 11, 1862, ch. 142, and March 3, 1863, ch. 73, passed during the War of the Rebellion, and enacting that these notes should "be lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. 12 Stat. 345, 532, 709. * * * *

The act of May 31, 1878, ch. 146, under which the notes in question were reissued, is entitled "An Act to forbid the further retirement of United States legal tender notes," and enacts as follows:—

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation: Provided, That nothing herein shall prohibit the cancellation and destruction of mutilated notes and the issue of other notes of like denomination in their stead, as now provided by law. All acts and parts of acts in conflict herewith are hereby repealed." 20 Stat. 87.

The manifest intention of this act is that the notes which it di-

rects, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress, declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

Upon full consideration of the case, the court is unanimously of opinion that it cannot be distinguished in principle from the cases heretofore determined, reported under the names of the Legal Tender Cases, 12 Wall. 457; Dooley *v.* Smith, 13 Wall. 604; Railroad Company *v.* Johnson, 15 Wall. 195; and Maryland *v.* Railroad Company, 22 Wall. 105; and all the judges, except Mr. Justice Field, who adheres to the views expressed in his dissenting opinions in those cases, are of opinion that they were rightly decided. * * * *

By the Articles of Confederation of 1777, the United States in Congress assembled were authorized "to borrow money or emit bills on the credit of the United States;" but it was declared that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled." Art. 2; Art. 9 § 5; 1 Stat. 4, 7. Yet, upon the question whether, under those articles, Congress, by virtue of the power to emit bills so on the credit of the United States, had the power to make bills so emitted a legal tender, Chief Justice Marshall spoke very guardedly, saying: "Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States." Craig *v.* Missouri, 4 Pet. 410, 435. But in the Constitution, as he had before observed in McCulloch *v.* Maryland, "there is no phrase which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. * * * *

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the gov-

ernments of the several States. Weston *v.* Charleston City Council, 2 Pet. 449; Banks *v.* Mayor, 7 Wall. 16; Bank *v.* Supervisors, 7 Wall. 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. * * * *

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. United States Bank *v.* Bank of Georgia, 10 Wheat 333, 347; Ward *v.* Smith, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in McCulloch *v.* Maryland, 4 Wheat. 316, and in Osborn *v.* United States Bank, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat. 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the currency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib. 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank *v.* Fenno, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals, or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. Veazie Bank *v.* Fenno, above cited; National Bank *v.* United States, 101 U. S., 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot

be questioned that Congress may constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." 8 Wall. 549; 101 U. S., 6. * * * *

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. Austria *v.* Day, 2 Giff. 628, and 3 D. F. & J. 217. This power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. * * * *

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow

money and to provide a national currency, is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several samples of this. * * * *

Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the governmen of the United States."

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in McCulloch *v.* Maryland: "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat. 423.

It folows that the act of May 31, 1878, ch. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under the act, was a tender of lawful money in payment of the defendant's debt to the paintiff. *Judgment affirmed.*

NOTE. See also Veazie Bank *v.* Fenno, page 57.

SECTION V.

THE WAR POWER OF CONGRESS.

THE PRIZE CASES.

2 BLACK. 635. 1862.

These cases were brought to test the legality of the seizure of certain vessels found running the blockade of the Southern ports during the Civil War. (The details of the cases are omitted and only a portion of the opinion dealing with the war power of Congress is here cited.)

MR. JUSTICE GRIER delivered the opinion of the court.

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole excessive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be *"unilateral."* Lord Stowell (1 Dodson, 247) observes: "It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized *"a state of war as existing by the act of the Republic of Mexico."* This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the

shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. *Seizure of vessels was upheld.*

SECTION VI.

THE POWER OF CONGRESS OVER THE TERRITORIES.

Sub-Section A.

The Insular Tariff Cases.

DE LIMA *v.* BIDWELL.

182 U. S., 1. 1900.

This was an action in the Supreme Court of New York State by the firm of De Lima & Co., against the collector of the port of New York, G. R. Bidwell, to recover duties paid under protest upon certain importations of sugar from San Juan, Porto Rico, during the autumn of 1899, and subsequent to the cession of the island to the United States. (The Foraker Act of April 12, 1900, had not been passed when these goods were brought into New York). The case was removed to the Circuit Court of the United States, which decided in favor of the collector of the port and against De Lima & Co.'s right to recover the duties. De Lima & Co. then appealed the case to the Supreme Court of the United States, and claimed that the tariff duties could only be collected on goods coming from a foreign country and that Porto Rico was no longer a foreign country.

MR. JUSTICE BROWN delivered the opinion of the court.

"This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws. * * * *

By Article II, section 2, of the Constitution, the President is given power, "by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur;" and by Art. VI, "this Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land." It will be observed that no distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress, and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two-thirds of the senators present, but each of them is the supreme law of the land.

One of the ordinary incidents of a treaty is the cession of territory. It is not too much to say it is the rule, rather than the exception, that a treaty of peace, following upon a war, provides for a cession of territory to the victorious party. It was said by Chief Justice Marshall in American Ins. Co. *v.* Canter, 1 Pet. 511, 542: "The Constitution confers absolutely upon the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty." The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress.

It follows from this that by the ratification of the treaty of Paris the island became territory of the United States—although not an organized territory in the technical sense of the word. * * * *

But whatever be the source of this power, its uninterrupted exercise by Congress for a century, and the repeated declarations of this court, have settled the law that the right to acquire territory involves the right to govern and dispose of it. That was stated by Chief Justice Taney in the Dred Scott case. In the more recent case of National Bank *v.* County of Yankton, 101 U. S., 129, it was said by Mr. Chief Justice Waite that Congress "has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people under the Constitution of the United States, may do for the States." * * * * In short, when once acquired by treaty, it (the territory) belongs to the United States, and is subject to the disposition of Congress.

Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories; either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. Thus, a statute forbidding the sale of liquors to minors applies not only to minors in existence at the time the statute was enacted, but to all who are subsequently born; and ceases to apply to such as thereafter reach their majority. So, when the Constitution of the United States declares in Art. 1, Sec. 10, that the States shall not do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a territorial legislature, such restrictions cease to operate the moment such territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic. So, too, if Congress saw fit to cede one of its newly acquired territories (even assumig that it had the right to do so) to a foreign power, there could be no doubt that from the day of

such cession and the delivery of possession, such territory would become a foreign country, and be reinstated as such under the tariff laws. Certainly no act of Congress would be necessary in such case to declare that the laws of the United States had ceased to apply to it.

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary for the adequate administration of a domestic territory to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. We express no opinion as to whether Congress is bound to appropriate the money to pay for it. This has been much discussed by writers upon constitutional law, but it is not necessary to consider it in this case, as Congress made prompt appropriation of the money stipulated in the treaty. This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can can do within its own boundaries, and yet that territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words.

If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of lighthouses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in

this assumption that a territory may be at the same time both foreign and domestic.

We are therefore of the opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them.

The judgment of the Circuit Court is therefore *Reversed.*

NOTE. Five justices concurred in the majority opinion. Three justices dissented upon the ground that as the custom laws of the United States had not as yet been applied by Congress to Porto Rico, that such island was still foreign within the meaning of the Dingley Tariff act. Justice Gray dissented upon the ground that the majority opinion was irreconcilable with the opinion of the majority of the court in Downes *v.* Bidwell.

DOWNES *v.* BIDWELL.

182 U. S., 244. 1900.

This was an action begun in the Circuit Court of the United States for the southern district of New York, by Downes, against the collector of the port of New York, Bidwell, to recover duties paid under protest upon certain oranges consigned to Downes in New York and brought thither from San Juan, Porto Rico, in November, 1900, after the passage of the act of Congress taking effect May 1, 1900, and known as the Foraker act, which provided for a civil government and revenues for the island of Porto Rico and required the payment of 15% of the duty levied on like articles from foreign countries should be collected on goods coming from Porto Rico. The Circuit Court decided in favor of the collector of the port of New York and against Downes' right to recover the duties, whereupon Downes appealed to the United States Supreme Court.

MR. JUSTICE BROWN announced the conclusion and judgment of the court. * * * *

In the case of De Lima *v.* Bidwell, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." (Art. 1, sec. 8). If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by sec. 9 "vessels bound to or from one State" cannot "be obliged to enter, clear or pay duties in another."

The case also involves the broader question whether the revenue

clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court. * * * *

To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Consitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several States.

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill *of that description*. Perhaps, the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the Act of March 27, 1804, providing for the proof of public records, applied the provisions of the act not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several States.

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdicition of the United States, which are not *of* the United States.

In determining the meaning of the words of Article 1, section 6, "uniform throughout the United States," we are bound to consider not only the provisions forbidding preference being given to the ports of one State over those of another, (to which attention has already been called,) but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State

shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others. The opinion of Mr. Justice White in Knowlton *v.* Moore (178 U. S. 41) contains an elaborate historical review of the proceedings in the convention, which resulted in the adoption of these different clauses and their arrangement, and he there comes to the conclusion (p. 105) that "although the provision as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption," they were originally placed together, and "became separate only in arranging the Constitution for the purpose of style." Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. * * * *

We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their *status*, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time, (to be judged of by the Congress of the United States,) to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," &c.; and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants * * * shall be de-

termined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto. * * * *

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore *Affirmed.*

NOTE. There were a number of separate opinions delivered by the justices. Those who concurred in the majority judgment came to the same conclusion as Mr. Justice Brown but by a different line of reasoning. For example, Justices White, Shiras and McKenna held that until Congress has formally incorporated the territory into the United States, the various provisions of the Consitution are inapplicable thereto, as otherwise, so far as fiscal matters are concerned, the action of the treaty making power could override the will of Congress.

The four justices who dissented held that uniformity of taxation means geographical uniformity throughout the United States and that the phrase "the United States" includes the territories as well as the States.

DOOLEY *v* UNITED STATES

183 U. S., 151. 1901.

The Foraker Act required all merchandise going into Porto Rico from the United States to pay a duty of 15 per cent. of the amount of duties paid upon merchandise imported from foreign countries. Dooley, Smith and Company imported certain merchandise into Porto Rico from New York. They paid the duties under protest and now sue in the Circuit Court to recover them back on the ground that the Foraker Act is unconstitutional, being repugnant to the clause in the Constitution declaring "no tax or duty shall be laid on articles of export from any State." The Circuit Court decided that the duties were properly collected, whereupon Dooley, Smith and Company appealed the case to the United States Supreme Court.

MR. JUSTICE BROWN delivered the opinion of the court.

While the words "import" and "export" are sometimes used to denoted goods passing from one State to another, the word "import," in connection with the provision of the Constitution that "no State shall levy any imposts or duties on imports or exports," was held in Woodruff v. Parkham, 8 Wall. 123, to apply only to articles imported from foreign countries into the United States. * * * *

In discussing this question and particularly of the power of Congress to levy and collect taxes, duties, imposts and excises, MR. Justice Miller observed: "Is the word 'impost,' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word "imposts" as used in the first mentioned clause, the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries the power and its limitations concerning imports."

It follows, and is the logical sequence of the case of Woodruff v. Parkham, that the word "export" should be given a correlative meaning, and applied only to goods exported to a foreign country. Muller v. Baldwin, L. R. 9 Q. B. 457. If, then, Porto Rico be no longer a foreign country under the Dingley Act, as was held by a majority of this court in De Lima v. Bidwell, 182 U. S. 1, and Dooley v. United States, 182 U. S. *222*, we find it impossible to say that goods carried from New York to Porto Rico can be considered as "exported" from New York within the meaning of that clause of the Constitution. If they are neither exports nor imports, they are still liable to be taxed by Congress under the ample and comprehensive authority conferred by the Constitution "to lay and collect taxes, duties, imposts and excises." Art. 1, sec. 8.

* * * *

These duties were properly collected, and the action of the Circuit Court in sustaining the demurrer to the complaint was correct, and it is therefore *Affirmed.*

Sub-Section B.

Extension of the Constitution to the Territories.

MORMON CHURCH *v.* UNITED STATES

136 U. S., 1. 1890.

By virtue of an express reservation in the organic act of the Territory of Utah of the power to disapprove and annul the acts of its legislature, Congress on February 19th, 1887, repealed the act of incorporation of the Church of Jesus Christ of Later Day Saints (The Mormon Church), for the reason that one of the principal objects of the Mormon Church was the promotion and

practice of polygamy, which was prohibited by the laws of the United States.

In a proceeding under the Act of February 19, 1887, the Supreme Court of the Territory of Utah decreed that the Corporation of the Church of Christ of Latter Day Saints was dissolved, whereupon the Church appealed to the Supreme Court of the United States, contending that Congress had not power to pass the Act of 1887.

MR. JUSTICE BRADLEY delivered the opinion of the court:

"Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the Territories and over the acts of the territorial legislatures established therein is generally expressly reserved in the organic acts establishing governments in said Territories. This is true of the Territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. * * * * All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

The decree of the Supreme Court of Utah was affirmed.

HAWAII *v.* MANKICHI

190 U. S., 197. 1903.

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, in Hawaii, where he was confined upon conviction for manslaughter. He alleged a violation of the Constitution in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict. In support of his contention, Mankichi cited the Newlands Resolution of July 7, 1898, annexing Hawaii, which provided that, "The municipal legislation of the Hawaiian Islands, not contrary to the Constitution of the United States, shall remain in force until the Congress of the United States shall otherwise determine." Mankichi's conviction was in accord with the municipal law of Hawaii, but he claimed this law violated Article V of the Amendments to the Constitution, which provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and Article VI of

the Amendments, which provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The Supreme Court has interpreted this clause in regard to a jury trial to mean a trial by a common law jury of twelve men who shall render an unanimous verdict. From an order of the United States District Court discharging the prisoner the Attorney-General of the Territory appealed to the Supreme Court of the United States.

MR. JUSTICE BROWN delivered the opinion of the court:

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands, every provision of the Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making prejaration. * * *

It is not intended here to decide that the words "nor contrary to the Constitution of the United States," are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing conditions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal status of Hawaii, allowing a conviction of treason on circumstantial evidence, or the testimony of one witness, depriving a person of liberty by the will of the ligislature and without process, or confiscating private property for public use without compensation, remain in force after the annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would go even farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the mo-

ment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being.

The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.

NOTS.—In Rassmusen *v.* U. S., 197 U. S. 516, the Supreme Court held that trial by jury is a constitutional incident to judicial procedure in Alaska because under the terms of the treaty and by subsequent act of Congress Alaska has been incorporated into the United States.

GONZALES *v.* WILLIAMS

192 U. S., 1. 1904.

This was an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of *habeas corpus* issued on her behalf, and remanding her to the custody of the United States Commissioner of Immigration at the port of New York. It appeared that Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris; she arrived at the Port of New York from Porto Rico, August 24, 1902, when she was prevented from landing and detained as "an alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge. If she was not an alien immigrant within the intent and meaning of the Act of Congress (Act March 3, 1891, relative to immigration) the commissioner had no power to detain or deport her.

MR. CHIEF JUSTICE FULLER delivered the opinion:

* * * * The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 2, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899. Then followed an act entitled "An act temporarily to provide remedies and civil government for Porto Rico, and for other purposes," approved April 12, 1900. * * * *

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of the People

of Porto Rico. Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens and the right of free access denied to them. Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States, and not alienage. We do not think so, and on the contrary, are of opinion that if Gonzales were not an alien within the act of 1891, the order below was erroneous, * * * * We cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien" so used in the act of 1891, embraces the citizens of Porto Rico. We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degatau, in his excellent argument as *amicus curiae,* that a citizen of Porto Rico, under the Act of 1900 is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the Act of 1891. * * * ..*Final order reversed and cause remanded with a direction to discharge Gonzales.*

SECTION VII

THE IMPLIED POWERS OF CONGRESS

Sub-Section A.

Exclusion of Foreigners.

THE CHINESE EXCLUSION CASE

CHAE CHANG PING *v* UNITED STATES

130 U. S., 581. 1889.

The facts are sufficiently stated in the opinion of the court.

MR. CHIEF JUSTICE FIELD delivered the opinion of the court.

The appellant is a subject of the Emperor of China and a laborer by occupation. He resided at San Francisco, California, following his occupation, from some time in 1875 until June 2, 1887, when he left for China on the steamship "Gaelic," having in his possession a certificate, in terms entitling him to return to the United States, bearing date on that day, duly issued to him by the collector of customs of the port of San Francisco, pursuant to

the provisions of section four of the restriction act of May 6, 1882, as amended by the Act of July 5, 1884.

On the 7th of September, 1888, the appellant, on his return to California, sailed from Hong Kong in the steamship "Belgic," which arrived within the port of San Francisco on the 8th of October following. On his arrival he presented to the proper custom-house officers his certificate, and demanded permission to land. The collector of the port refused the permit, solely on the ground that under the act of Congress, approved October 1, 1888, supplementary to the restriction acts of 1882 and 1884, the certificate had been annulled and his right to land abrogated, and he had been thereby forbidden again to enter the United States. The captain of the steamship, therefore, detained the appellant on board the steamer. Thereupon a petition on his behalf was presented to the Circuit Court of the United States for the Northern District of California, alleging that he was unlawfully restrained of his liberty, and praying that a writ of *habeas corpus* might be issued directed to the master of the steamship, commanding him to have the body of the appellant, with the cause of his detention, before the court at a time and place designated, to do and receive what might there be considered in the premises. A writ was accordingly issued, and in obedience to it the body of the appellant was produced in court. Upon the hearing which followed, the court, held that the appellant was not entitled to enter the United States, and was not unlawfuly restrained of his liberty, and ordered that he be remanded to the custody of the master of the steamship from which he had been taken under the writ. From this order an appeal was taken to this court.

The appeal involves a consideration of the validity of the Act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the act of 1882 as amended by the act of 1884, granting them permission to return. The validity of the act is assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress. * * * *

There being nothing in the treaties between China and the United States to impair the validity of the Act of Congress of October 1, 1888, was it on any other ground beyond the competency of Congress to pass it? If so, it must be because is was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States. Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude

aliens it would be to that extent subject to the control of another power. * * * *

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the Unitel States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. * * * * *Order Affirmed.*

Sub-Section B.

Right of Eminent Domain.

KOHL *v.* UNITED STATES

91 U. S., 367. 1875

Congress by act of March 2, 1872, authorized the Secretary of the Treasury to purchase in the City of Cincinnati a suitable site for a building for the accommodation of the United States post office and for other public purposes, and by a subsequent act made an appropriation "for the purchase at private sale or by condemnation of such site." Pursuant to this act a proceeding was instituted in the Circuit Court by the United States to appropriate a certain parcel of land in the city of Cincinnati as a site for a post office. The owners of the property sought to be appropriated moved to dismiss the proceeding on the ground that Congress did not under the Constitution have the right of eminent domain. The Circuit

Court gave judgment for the United States. Appeal was taken to the United States Supreme Court.

MR. JUSTICE STRONG delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it, but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty stands. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In Albeman v. Booth, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permis-

sion to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate, The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The Fifth Amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken? * * * *

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. * * * * The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which is must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

The judgment of the lower court is affirmed

Sub-Section C.

The power to make all laws necessary and proper for carrying into excution the enumerated powers.

McCulloch v. Maryland. See page 60.
Gibbons v. Ogden. See page 78.
Julliard v. Greenman. See page 144.

SECTION VIII.

Restrictions on the Powers of Congress.

Sub-Section A.

The Bill of Rights (First Ten Amendments.)

BARRON *v.* BALTIMORE.

7 PET. 243. 1833.

Barron brought suit against the City of Baltimore to recover damages for injuries to certain wharf-property owned by him in Baltimore. The value of his deep water wharf had been destroyed by a sand bar created in front of it, in consequence of a change of water currents in the harbor. It appeared that the City of Baltimore in the exercise of its corporate authority over paving and grading of streets and over the health of its inhabitants had diverted certain streams of water from their natural and accustomed course and caused them to flow into the harbor in such a way as to deposit sand in front of Barron's wharf. Barron could get no redress in the State courts and took an appeal to the Federal courts, carrying his case to the Supreme Court of the United States, alleging a violation of Article V of the amendments to the Constitution of the United States, which declares that "private property shall not be taken for public use without just compensation."

MARSHALL, C. J., delivered the opinion of the court.

* * * The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the 5th amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution

was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the 10th section of the 1st article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power, by the departments of the general government. Some of them use language applicable to Congress; others are expressed in general terms. The 3d clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto law*." This provision, then, of the 9th section, however comprehensive its language, contains no restriction on State legislation.

The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the 10th proceeds to enumerate those which were to operate on the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No States shall enter into any treaty," etc. Perceiving that in a Consitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms; the restrictions contained in the 10th section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole

people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the 9th and 10th sections of the 1st article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two thirds of Congress, and the assent of three fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and haxe expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government, not against those of the local governments.

In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Consitution, declaring that private property shall not be taken for public use wihout just compensation, is intended solely as a limitation on the exercise of power by the government of the United

States, and is not applicable to the legislation of the States. We are therefore of opinion, that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

Sub-Section B.

Meaning of Ex Post Facto.

CALDER *v.* BULL.

3 DALLAS, 386. 1798.

One Morrison made a will in 1779, giving certain lands in Connecticut to the wife of Bull. The will was offered for probate in 1793, but probate was refused, and the wife of Calder, as Morrison's heiress at law, was held to be entitled to the property. Under the statute law of Connecticut at that time no appeal could be taken from the decree of the probate court after eighteen months had elapsed from the date of the decree. In 1795, more than two years after the decree refusing probate had been entered, the State legislature passed an act setting aside the decree of the probate court and granting a new hearing in the matter of Morrison's will. The rehearing was subsequently had, the will was admitted to probate and the wife of Bull, as devisee, was declared entitled to the property. The Supreme Court of Errors of Connecicut found that there was no error in the decree of the probate court at the rehearing. Mrs. Calder then claimed that Mrs. Bull's right was barred by the lapse of eighteen months from the date of the decree refusing probate; that the subsequent statute providing for the rehearing was an *ex post facto* law and therefore unconstitutional, under Art I, sec. 10 of the Constitution, which prohibits a State from passing an *ex post facto* law.

Appeal was taken to the United States Supreme Court.

MR. JUSTICE CHASE delivered the following opinion:

* * * * The Constitution of the United States, Art. 1, s. 9, prohibits the legislature of the United States from passing any *ex post facto* law; and in Sec. 10 lays several restrictions on the authority of the legislatures of the several States; and among them, "that no State shall pass any *ex post facto* law.

It may be remembered that the legislatures of several of the States, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their State constitutions, from passing any *ex post facto* law.

I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the Federal Constitution. The prohibition, "that no State shall pass any *ex post facto* law," necessarily requires some explanation; for

naked and without explanation it is unintelligible, and means nothing. Literally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature or kind; and by whom done? That Charles I., king of England, was beheaded; that Oliver Cromwell was protector of England; that Louis XVI., late king of France, was guillotined,—all facts that have happened; but it would be nonsense to suppose that the States were prohibited from making any law after either of these events, and with reference thereto. The prohibition in the letter is not to pass any law concerning and after the fact, but the plain and obvious meaning and intention of the prohibition is this, that the legislatures of the several States shall not pass laws after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law, was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being effected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law: the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly; and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning and after the facts com-

mitted. But I do not consider any law *ex post facto,* within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws," are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Woodeson, and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

[The other judges of the court delivered opinions and the decree of the Supreme Court of Errors of Connecticut was affirmed, all concurring.]

NOTE. *See also case of Ex parte Garland, page* 44.

Sub-Section C.

Meaning of Due Process of Law.

MURRAY'S LESSEE *v.* THE HOBOKEN LAND AND IMPROVEMENT COMPANY.

18 HOWARD, 272. 1855.

The Act of Congress of May 15, 1820, provided for the collection of sums due the United States from a delinquent tax collector by a summary process. This process consisted of an auditing of accounts, a certification of any deficiency by the comptroller, the issuing of a warrant of distress by the Solicitor of the Treasury and a sale thereunder by an United States marshal of the delinquent's property. In accordance with this act the account of Samuel Swartwout, collector of customs for the port of New York for eight years before the 29th of March, 1838, was audited and was found to be delinquent in the sum of $1,374,119.65. A warrant was issued by the Solicitor of the Treasury, by virtue of which the marshal of the United Statess old Swartwout's property on June 1, 1839, to the defendants. The plaintiff's claim the same property under a levy of execution of April 10, 1839, and brought an action of ejectment. The plaintiffs claimed that the mode of procedure provided for by the

Act of 1820, resulted in a deprivation of property without due process of law within the meaning of the Fifth amendment to the Constitution of the United States, and that as the proper method to pursue was an ordinary suit at law, no title passed to the defendants. The Circuit Court was divided in its opinion, and the case was certified to the United States Supreme Court.

MR. JUSTICE CURTIS delivered the opinion of the court.

* * * The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in Magna Charta. Lord Coke, in his commentary on those words, says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the great charter, more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words. * * * *

That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which migh be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages in the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of Magna Charta treats of their restraint. It declares: "We or our bailiffs shall not seize any land or rent for any debt as long as the present goods and chattels of the debtor do suffice to pay the debt, and the debtor himself be ready to satisfy therefor. Neither shall the pledges of the debtor be distrained, as long

as the principal debtor is sufficient for the payment of the debt; and if the principal debtor fail in payment of the debt, having nothing wherewith to pay, or will not pay where he is able, the pledges shall answer for the debt. And if they will, they shall have the lands and rents of the debtor until they be satisfied of the debt which they before paid for him, except that the principal debtor can show himself to be acquitted against the said sureties."

By the common law, the body, lands, and goods of the king's debtor were liable to be levied on to obtain payment. In conformity with the above provision of Magna Charta a conditional writ was framed, commanding the sheriff to inquire of the goods and chattels of the debtor, and, if they were insufficient, then to extend on the lands. * * * *

This brief sketch of the modes of proceeding to ascertain and enforce payment of balances due from receivers of the revenue in England is sufficient to show that the methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and that, as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the Act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the deftult, and by such warrant proceed to collect it. * * * Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the Act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public debtors without any such trial; and this brings us to the question,

whether those provisions of the Constitution which relate to the judicial power are incompatible with the proceedings? * * * *

Among the legislative powers of Congress are the powers "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and welfare of the United States; to raise and support armies; to provide and maintain a navy; and to make all laws which may be necessary and proper for carrying into execution those powers." What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and whom they should account, and what security they should furnish; and to what remedies they should be subjected to enforce the proper discharge of their duties, Congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the Treasury Department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the Act of 1820, now in question, they have undertaken to provide summary means to compel these officers—and in case of their default, their sureties—to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.

As we have already shown, the means provided by the Act of 1820 do not differ in principle from those employed in England from remote antiquity—and in many of the States, so far as we know without objection—for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to.

(The court came to the conclusion that the process under which the premises in question were sold to the defendants was due process of law and gave judgment accordingly.)

CHAPTER III.

THE JUDICIAL DEPARTMENT.

SECTION I.

The Original Jurisdiction of the Supreme Court.

Sub-Section A.

Cases affecting Ambassadors, other Public Ministers and Consuls.

BORS *v.* PRESTON.

111 U. S., 252. 1884.

This action was brought in the Circuit Court of the United States for the southern district of New York. The plaintiff, Preston, was a citizen of the State of New York, while the defendant is the consul, at the port of New York, for the Kingdom of Norway and Sweden. The action was brought to recover damages for a conversion by defendant of certain articles of merchandise belonging to the plaintiff. A verdict was rendered in favor of the plaintiff for $7,313.10. The question was raised as to whether, under the Constitution and laws of the United States, a Federal circuit court may, under any circumstances, hear and determine a suit against the consul of a foreign government.

MR. JUSTICE HARLAN delivered the opinion of the court.

* * * * The Constitution declares that "the judicial power of the United States shall extend * * * * to all cases affecting ambassadors or other public ministers and consuls;" "to controversies between citizens of a State and foreign citizens or subjects;" that "in all cases affecting ambassadors, other public ministers and consuls * * * * the Supreme Court shall have original jurisdiction;" and that in all other cases previously mentioned in the same clause "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The Judiciary Act of 1789 invested the District Courts of the United States with "jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls," except for offences of a certain character; this court, with "original, but not exclusive, jurisdiction of all suits * * * in which a consul or vice-consul shall be a party;" and the Circuit Courts, with jurisdiction of civil suits in which an alien is a party. In this act we have an affirmance by the first Congress—many of whose members participated in the convention which adopted the Constitution, and were, there-

fore, conversant with the purposes of its framers—of the principle that the original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments. On a question of constitutional construction, this fact is entitled to great weight.

Very early after the passage of that act the case of United States *v.* Ravara, 2 Dall. 297, was tried in the Circuit Court of the United States for the District of Pennsylvania, before Justices Wilson and Iredell of this court, and the district judge. It was an indictment against a consul for a misdemeanor, of which, it was claimed, the Circuit Court had jurisdiction under the eleventh section of the Judiciary Act, giving Circuit Courts "exclusive cognizance of all crimes and offences cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein." In behalf of the accused it was contended that this court, in virtue of the constitutional grant to it of original jurisdiction in all cases affecting consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the district judge concurred in overruling this objection. They were of opinion that although the Constitution invested this court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction, in those cases, upon such inferior courts as might, by law, be established. Mr. Justice Iredell dissented, upon the ground that the word "original," in the clause of the Constitution under examination, meant exclusive. The indictment was sustained, and the defendant upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.

In United States *v.* Ortega, 11 Wheat. 467,—which was a criminal prosecution, in a Circuit Court of the United States, for the offence of offering personal violence to a public minister, contrary to the law of nations and the Act of Congress,—one of the questions certified for decision was whether the jurisdiction conferred by the Constitution upon this court, in cases affecting ambassadors or other public ministers and consuls, was not only original but exclusive of the Circuit Courts. But its decision was waived and the case determined upon another ground. Of that case it was remarked by Chief Justice Taney, in Gittings *v.* Crawford, Taney's Dec. 1, 5, that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions.

In Davis *v.* Packard, upon error to the Court for the Correction of Errors of the State of New York, the precise question presented was whether, under the Constitution and laws of the United States, a State court could take jurisdiction of civil suits against foreign consuls. It was determined in the negative, upon the ground that by the ninth section of the Act of 1789 jurisdiction

was given to the District Courts of the United States, exclusively of the courts of the several States, of all suits against consuls and vice-consuls, except for certain offences mentioned in the act. The jurisdiction of the State courts was denied because—and no other reason was assigned—jurisdiction had been given to the District Courts of the United States exclusively of the former courts; a reason which probably would not have been given had the court, as then organized, supposed that the constitutional grant of original jurisdiction to this court in all cases affecting consuls, deprived Congress of power to confer concurrent original jurisdiction, in such cases, upon the subordinate courts of the Union. It is not to be supposed that the clause of the Constitution giving original jurisdiction to this court in cases affecting consuls, was overlooked, and, therefore, the decision, in that case, may be regarded as an affirmance of the constitutionality of the Act of 1789, giving original jurisdiction in such cases, also, to District Courts of the United States.

In St. Luke's Hospital *v.* Barclay, 3 Blatch. 259, which was a suit in equity in the Circuit Court of the United States for the Southern District of New York, the question was distinctly raised whether the consular character of the alien defendant exempted him from the jurisdiction of the Circuit Courts. The jurisdiction of the Circuit Court was maintained, the opinion of the court being that the jurisdiction of the District Courts was made by statute exclusive only of the State courts, and that under the eleventh section of the act of 1789, the defendant being an alien,—no exception being made therein as to those who were consuls,—was amenable to a suit in the Circuit Court brought by a citizen. Subsequently the question was reargued before Mr. Justice Nelson and the district judge, and the proposition was pressed that the defendants could not be sued except in this court or in some District Court. But the former ruling was sustained. * * * *

(In Gittings *v.* Crawford, Taney's Dec. 1,) the former adjudications of this and other courts of the Union were there examined, and the conclusion reached—and in that conclusion we concur—that, as Congress was not expressly prohibited from giving original jurisdiction in cases affecting consuls to the inferior judicial tribunals of the United States, neither public policy nor convenience would justify the court in implying such prohibition, and upon such implication ,pronounce the act of 1789 to be unconstitutional and void. Said Chief Justice Taney: "If the arrangement and classification of the subjects of jurisdiction into appellate and original, as respects the Supreme Court do not exclude that tribunal from appellate power in the cases where original jurisdiction is granted, can it be right, from the same clause, to imply words of exclusion as respects other courts whose jurisdiction is not there limited or prescribed, but left for the future regulation of Congress? The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court, does not, of itself, imply that that jurisdiction is to be exclusive. * * * *

It is thus seen that neither the Constitution nor any Act of Congress defining the powers of the Courts of the United States has made the jurisdiction of this court, or of the District Courts, exclusive of the Circuit Courts in suits brought against persons who hold the position of consul, or in suits of proceedings in which a consul is a party. The jurisdiction of the latter courts, conferred without qualification, of a controversy between a citizen and an alien, is not defeated by the fact that the alien happens to be the consul of a foreign government. Consequently, the jurisdiction of the court below cannot be questioned upon the ground simply that the defendant is the consul of the Kingdom of Norway and Sweden.

(The court then proceeded to discuss a matter of pleading arising in the record of the case and remanded the cause for further proceedings consistent with this opinion.)

SECTION II.

The Appellate Jurisdiction of the Supreme Court.

Sub-Section A.

Over State Courts.

MARTIN *v.* HUNTER'S LESSEE.

1 WHEATON, 304. 1816.

This was a writ of error to the Court of Appeals of the State of Virginia, founded upon the refusal of that court to obey the mandate of the Supreme Court of the United States, requiring the judgment rendered in this same cause to be carried into execution. The following is the judgment of the Court of Appeals of Virginia rendered on the mandate, "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States. * * * That the writ of error in this cause was improvidently allowed under the authority of that that; (Act of Congress establishing judicial courts and extending appellate jurisdiction of the Supreme Court,) that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court and that obedience to its mandate be declined by the court." The original suit was an action of ejectment to determine the title to certain lands in Virginia, which lands were claimed by one Denny Fairfax, a British subject, whose title was protected, it was asserted, by the Treaty of 1783 with Great Britain. The principal question, however, related to the appellate jurisdiction of the Supreme Court of the United States.

MR. JUSTICE STORY delivered the opinion of the court.

* * * This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must, therefore, in all other cases, subsist in the utmost latitude of which, in its own nature, it is susceptible.

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over State tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the Supreme Court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws, and treaties of the United States or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it

must be construed to be exclusive; and this not only when the *casus faederis* should arise directly, but when it should arise, incidentally, in cases pending in State courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances, it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the State courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It is obvious that this obligation is imperative upon the State judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws, and treaties of the United States, "the supreme law of the land." * * * *

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. It was foreseen that, in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over State courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties, but only upon the people, and that, if the power exists, it will materially impair the sovereignty of the States, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon States, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the State. The language of the Constitution is also imperative upon the States, as to the performance of many duties. It is imperative upon the State legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the States are, in some respects, under the control of Congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to suport the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of State judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute or irresistible force, than for giving it to the acts of the other co-ordinate departments of State sovereignty. * * * *

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts; first, because State judges are bound by oath to support the Constitution of the United States,

and must be presumed to be men of learning and integrity; and, secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judical power, from the State courts to the courts of the United States, at any time before final judgment, though not after final judgment, As to the first reason,—admitting that the judges of the State courts are, and always will be, of as much learning, integrity, and wisdom as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between States; between citizens of different States; between citizens claiming grants under different States; between a State and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the State courts. In respect to the other enumerated cases—the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction—reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different States, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the Constitution. What, indeed, might then have been only prophecy has now become fact;

and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the State court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from State courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. * * *

On the whole, the court are of opinion that the appellate power of the United States does not extend to cases pending in the State courts; and that the 25th section of the Judiciary Act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

Judgment of the Court of Appeals of Virginia rendered on the mandate in this cause reversed.

Sub-Section B.

Suits Between States.

NEW HAMPSHIRE *v* LOUISIANA

NEW YORK *v* LOUISIANA

108 U. S., 76. 1883.

On the 18th of July, 1879, the legislature of New Hampshire passed a statute which provided that whenever a citizen of the State should own a claim against another State of the United States, arising upon a written obligation to pay money which should be past due and unpaid, that such citizen could assign the claim to the State, and the Attorney-General of the State should institute a pro-

ceeding in the name of the State in the Supreme Court of the United States to recover the amount due. Under this act, certain bonds of the State of Louisiana were assigned to the State of New Hampshire by one of its citizens for the purpose of suit as contemplated in the act. A similar statute in New York, passed May 15, 1880, was the basis for a suit upon bonds of the same character, assigned to the State of New York by one of its citizens. The two cases were heard together.

MR. CHIEF JUSTICE WAITE delivered the opinion.

The first question we have to settle is whether, upon the facts shown, these suits can be maintained in this court.

Art. III., sec. 2, of the Constitution provides that the judicial power of the United States shall extend to "controversies between two or more States," and "between a State and a citizen of another State." By the same article and section it is also provided that in cases "in which a State shall be a party, the Supreme Court shall have original jurisdiction." By the Judiciary Act of 1789, c. 20, sec. 13, 1 Stat. 80, the Supreme Court was given "exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of another State, or aliens, in which latter case it shall have original but not exclusive jurisdiction."

Such being the condition of the law, Alexander Chisholm, as executor of Robert Farquar, commenced an action of assumpsit in this court against the State of Georgia, and process was served on the governor and Attorney-General. Chisholm *v.* Georgia, 2 Dall. 419. On the 11th of August, 1792, after the process was thus served, Mr. Randolph, the attorney-general of the United States, as counsel for the plaintiff, moved for a judgment by default on the fourth day of the next term, unless the State should then, after notice, show cause to the contrary. At the next term Mr. Ingersoll and Mr. Dallas presented a written remonstrance and protestation on behalf of the State against the exercise of jurisdiction, but in consequence of positive instructions they declined to argue the question. Mr. Randolph, thereupon, proceeded alone, and in opening his argument said, "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before the remonstrance was read, I had learnt from the acts of another State, whose will must always be dear to me, that she too condemned it."

On the 19th of February, 1793, the judgment of the court was announced, and the jurisdiction sustained, four of the justices being in favor of granting the motion and one against it. All the justices who heard the case filed opinions, some of which were very elaborate, and it is evident the subject received the most careful consideration. Mr. Justice Wilson in his opinion uses this language, p. 465:—

"Another declared object (of the Constitution) is 'to establish justice.' This points, in a particular manner, to the judicial authority. And when we view this object in conjunction with the decla-

ration, 'that no State shall pass a law imparing the obligation of contracts,' we shall probably think, that this object points, in a particular manner, to the jurisdiction of the court over the several States. What good purpose could this constitutional provision *secure,* if a State might pass a law impairing the obligations of *its own* contracts; and be amenable for such a violation of right, to no controlling judiciary power?"

And Chief Justice Jay, p. 479:—

"The extension of the judiciary power of the United States to such controversies, appears to me to be *wise,* because it is *honest,* and because it is *useful.* It is *honest,* because it provides for doing justice without respect to persons, and by securing individual citizens, as well as States, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is *useful,* because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occassions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action and enforces the great and glorious principle, that the people are the soverign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined."

Prior to this decision the public discussions had been confined to the power of the court, under the Constitution, to entertain a suit in favor of a citizen against a State; many of the leading members of the convention arguing, with great force, against is. As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction. About the time the judgment was rendered, another suit was begun against Massachusetts, and process served on John Hancock, the governor. This led to the convening of the general court of that Commonwealth, which passed resolutions instructing the senators and requesting the members of the House of Representatives from the State "to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or articles of the said Constitution, which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any courts of the United States." Other States also took active measures in the same direction, and, soon after the next Congress came together, the Eleventh Amendment to the Constitution was proposed, and afterwards ratified by the requisite number of States, so as to go

into effect on the 8th of January, 1798. That amendment is as follows:—

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign State.'

Under the operation of this amendment the actual owners of the bonds and coupons held by New Hampshire and New York are precluded from prosecuting these suits in their own names. The real question, therefore, is whether they can sue in the name of their respective States, after getting the consent of the State, or, to put it in another way, whether a State can allow the use of its name in such a suit for the benefit of one of its citizens.

The language of the amendment is, in effect, that the judicial power of the United States shall not extend to any suit commenced or prosecuted *by* citizens of one State against another State. No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds, and coupons. In New Hampshire, before the attorney-general is authorized to begin a suit, the owner of the bonds must deposit with him a sum of money sufficient to pay all costs and expenses, No compromise can be effected except with the consent of the owner of the claim. No money of the State can be expended in the proceeding, but all expenses must be borne by the owner, who may associate with the attorney-general such counsel as he chooses, the State being in no way responsible for fees. All moneys collected are to be kept by the attorney-general, as special trustee, separate and apart from the other moneys of the State, and paid over by him to the owner of the claim, after deducting all expenses incurred not before that time paid by the owner. The bill, although signed by the attorney-general, is also signed, and was evidently drawn, by the same counsel who prosecuted the suits for the bondholders in Louisina, and it is manifested in many ways that both the State and the attorney-general are only nominal actors in the proceeding. The bond owner, whoever he may be, was the promoter and is the manager of the suit. He pays the expenses, is the only one authorized to conclude a compromise, and if any money is ever collected, it must be paid to him without even passing through the form of getting into the treasury of the State.

In New York no special provision is made for compromise or the employment of additional counsel, but the bondholder is required to secure and pay all expenses and gets all the money that is recovered. This State, as well as New Hampshire, is nothing more or less than a mere collecting agent of the owners of the bonds and coupons, and while the suits are in the names of the States, they are under the actual control of individual citizens, and are prosecuted and carried on altogether by and for them.

It is contended, however, that, notwithstanding the prohibition of

the amendment, the States may prosecute the suits, because, as the "sovereign and trustee of its citizens," a State is "clothed with the right and faculty of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former." There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national power of levying war and making treaties. As was said in the United States *v.* Diekelman, 92 U. S. 524, if a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suits in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State." Art. 1, sec. 10, cl. 3.

But it is said that, even if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force, it got in lieu the constitutional right of suit in the national courts. There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. * * * * Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it could sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke

the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him. The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued; and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and

The bill in each of the cases is consequently dismissed.

Sub-Section C.

Suits Between the United States and a State.

UNITED STATES *v.* TEXAS

143 U. S., 621. 1892.

This was an original suit brought in the Supreme Court of the United States by the Attorney-General on behalf of the United States against the State of Texas. The Act of May 2, 1890, which provided a temporary government for the Territory of Oklahoma directed such a suit to be brought to establish the title of the United States to the country lying between the North and South Forks of the Red River, where the Indian Territory and the State of Texas adjoin. The State of Texas made an appearance to the action, but questioned the right of the Federal government to bring a suit against a State of the Union in one of its own courts.

MR. JUSTICE HARLAN delivered the opinion of the court.

(The court first passed upon the question of whether a dispute as to boundary line between States or Territories was a political or judicial question and concluded: "It cannot with propriety be said that a question of boundary between a Territory of the United States and one of the States of the Union is of a political nature, and not susceptible of judicial determination by a court having jurisdiction of such a controversy.")

The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it

seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas,—that State consenting that its courts may be open for the assertion of claims against it by the United States,—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts, and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the State tribunals." Story, Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by United States *v.* North Carolina, 136 U. S. 211. That was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The Constitution extends the judicial power of the United States "to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and martime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under

grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Art. 3, § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of controversy. Cohens v. Virginia, 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws, and treaties of the United States, and, also, one in which the United States is a party. It is, therefore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1. Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

The words, in the Constitution, "in all cases * * * * in which a State shall be party, the Supreme Court shall have original jurisdiction," necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff. It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of individuals against States. Hans *v.* Louisiana, 134 U. S. 1, and authorities there cited; North Carolina *v.* Temple, 134 U. S. 22, 30. It is, however, said that the words last quoted refer only to suits in

which a State is a party, and in which, also, the opposite party is another State of the Union or a foreign State. This cannot be correct, for it must be conceded that a State can bring an original suit in this court against a citizen of another State. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws, or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States "to *all* cases," in law and equity, arising under the Constitution, laws, and treaties of the United States, and to controveries in which the United States shall be a party, and confers upon this court original jurisdiction "in *all* cases" "in which a State shall be party," that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the general government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controveries of like character between the United States and a State. * * * *

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controveries arising between these two governments, "each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other," McCulloch *v.* State of Maryland, 4 Wheat. 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have

agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws, and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States), and equally to controveries to which the United States shall be a party, without regard to the subject of such controveries, and that this court may exercise original jurisdiction in all such cases, "in which a State shall be a party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. * * * *

(The court overruled the objection that a State could not be sued by the Federal Government.)

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

Mr. Justice Lamar and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.

SECTION III.

The Law Administered by the Federal Courts.

SWIFT *v.* TYSON.

16 PETERS, 1. 1842.

Suit was instituted in the Circuit Court of the United States by Swift, as indorsee of a bill of exchange, dated at Portland, Maine,

on May 1st, 1836, and accepted by Tyson in New York City. It was claimed by Tyson that the consideration for the bill was a pre-existing debt, that such a consideration was not a valid one under the law of New York, that the acceptance having been made in New York the contract was to be considered as a New York contract, and therefore governed by the laws of that State, which laws were obligatory upon the Federal court.

MR. JUSTICE STORY delivered the opinion of the court.

* * * In the present case, the plaintiff is a *bona fide* holder without notice for what the law deems a good and valid consideration, that is, for a pre-existing debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a pre-existing debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its courts, as well upon general principles, as by the express provisions of the 34th section of the Judiciary Act of 1789, c. 20. And then it is further contended that, by the law of New York, as thus expounded by its courts, a pre-existing debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. * * * *

But, admitting the doctrine to be fully settled in New York, it remains to be considered whether it is obligatory upon this court, if it differs from the principles established in the general commercial law. It is observable that the courts of New York do not found their decisions upon this point upon any local statute or positive, fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the 34th section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." In order to maintain the argument, it is essential, therefore, to hold that the word "laws," in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.

In all the various cases, which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did not apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke *v.* Lyde, 2 Burr. R. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world. * * * *

This question has been several times before this court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt, for which the negotiable instrument is transferred to him, is a pre-existing debt or is contracted at the time of the transfer. In each case, he equally gives credit to the instrument. The case of Coolidge *v.* Payson, 2 Wheat. 66, 70, 73, and Townsley *v.* Sumrall, 2 Pet. 170, 182, are directly in point.

We are all, therefore, of opinion that the question on this point, propounded by the Circuit Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court.

SECTION IV.

Suits Against a State by One of Its Citizens.

HANS *v.* LOUISIANA.

134 U. S., 1. 1890.

This suit was brought in the Circuit Court of the United States in Louisiana by Bernard Hans, a citizen of Louisiana, against the State of Louisiana to recover the amount of certain coupons, annexed to bonds issued by the State. The plaintiff contended that he, being a citizen of Louisiana, could maintain suit against the State, as the 11th Amendment to the Constitution prohibited only suits against a State which were brought by citizens of another State, or by citizens or subjects of a foreign State. The question was raised also as to the right of the State to impair the obligation of its own contract. The State appeared and excepted to the suit on the ground that a State could not be sued without its permission, and asked that the case be dismissed.

MR. JUSTICE BRADLEY delivered the opinion of the court:

* * * * The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.

The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the Federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitution which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, is as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity,....arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws, or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily in-

volves a Federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens.

That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Louisiana *v.* Jumel, 107 U. S. 711. This was a case arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against State officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the Federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States or of a foreign State; and may be thus sued in the Federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the Judiciary Act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of Chisholm *v.* Georgia, 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one

of the United States by citizens of another State or by citizens or subjects of any foreign State." The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. * * * *

The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. It was fully shown by an exhaustive examination of the old law by Mr. Justice Iredell in his opinion in Chisholm *v.* Georgia; and it has been conceded in every case since, where the question has, in any way, been presented, even in the cases which have gone farthest in sustaining suits against the officers or agents of States. In all these cases the effort was to show, and the court held, that the suits were not against the State or the United States, but against the individuals; conceding that if they had been against either the State or the United States, they could not be maintained. * * * *

Undoubtedly a State may be sued by its own consent, as was the case in Curran *v.* Arkansas, 15 How. 304, 309, and in Clark *v.* Barnard, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a State law which the legislature passed in conformity to the constitution of that State. But this court decided, in Beers v. Arkansas, 20 How. 527, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of State laws impairing the obligation of a contract. In that case the law allowing the State to be sued was modified pending certain suits against the State on its bonds, so as to require the bonds to be filed in court, which was objected to as an unconstitutional change of the law. Chief Justice Taney, delivering the opinion of the court, said: "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it... The prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new condi-

tions upon which the suits might still be allowed to proceed. In exercising this power the State violated no contract with the parties."

But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard-of when the Constitution was adopted—an additional reason why the jurisdiction claimed for the Circuit Court does not exist, is the language of the act of Congress by which its jurisdiction is conferred. The words are these: "The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties," &c., "concurrent with the courts of the several States." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The State courts have no power to entertain suits by individuals against a State without its consent. Then how does the Circuit Court, having only concurrent jurisdiction, acquire any such power? * * * *

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. While the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.

It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

Affirmed.

NOTE. See also *New Hampshire v. Louisiana*, page 183.

SECTION V.

The Power of the Courts to Declare an Act of the Legislature Null and Void.

1. As to Acts of Congress.

Marbury v. Madison, page. 21.
Hepburn v. Griswold, page 143.
Pollock v. Farmers' Ioan and Trust Company, page 71.

2. As to Acts of State Legislatures.

M'Culloch v. Maryland, page 60.
Gibbons v. Ogden, page 78.
Brown v. Maryland, page 107.

CHAPTER IV.

PRIVILEGES AND IMMUNITIES GUARANTEED BY THE CONSTITUTION.

SECTION I.

Trial by Jury.

EX PARTE MILLIGAN.

4 WALLACE, 2. 1866.

On the 10th day of May, 1869, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana in which he prayed that he be discharged from an alleged unlawful imprisonment. The facts of the case were as follows: Milligan was a citizen of the United States and a resident for twenty years of the State of Indiana. He was not, nor ever had been, in the military or naval service of the United States. While at his home, on the 5th day of October, 1864, he was arrested by order of General Hovey, commanding the military district of Indiana, and confined in a military prison near Indianapolis. On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, was tried on the charge of conspiracy against the Government of the United States, affording aid and comfort to rebels against the authority of the United States, and other charges. He was found guilty and sentenced to be hanged. The sentence was approved by the President of the United States. On the 2nd day of January, 1865, after the proceedings of the military commission were at an end, the Circuit Court of the United States for Indiana met at Indianapolis and empanelled a grand jury, who were charged to inquire whether the laws of the United States had been violated. The court adjourned January 27th, 1865, and discharged the jury from further service. No bill of indictment or presentment was found against Milligan, for any offense whatever by the grand jury. Milligan insisted that the military commission had no jurisdiction to try him, that he had not been a citizen of any of the States arrayed against the government, and that the right of trial by jury was guaranteed to him by the Constitution of the United States.

MR. JUSTICE DAVIS delivered the opinion of the court.

...The discipline necessary to the efficiency of the army and navy requires other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses commit-

ted while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and while thus serving, surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive the watchful care of those intrusted with the guardianship of the Constitution and laws. It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force * * * has the power, within the lines of his military district to suspend all civil rights and their remedies, and subject citizens as well as soldiers, to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of each one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance, for, if true, republican government is a failure, and there is an end of liberty regulated by law * * * Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconciliable; and, in the conflict, one or the other must perish * * * The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana has been and was again threatened with invasion by the enemy, the occasion was furnished to established martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. It is difficult to see

how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as well as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

The prisoner was discharged.

See also *Hawaii v. Mankichi,* page 159.

SECTION II.

CIVIL RIGHTS.

CIVIL RIGHTS CASES.

109 U. S., 3. 1883.

The Act of Congress of March 1, 1875, known as the Civil Rights Act, made it a criminal offense for any person to deny any citizen on account of race or color the full and equal enjoyment of the privileges and accommodations of inns, public conveyances, theatres, and other places of public amusement. Certain persons were indicted for violations of this act, and carried these cases to the Supreme Court of the United States in order to test the constitutionality of this act, their contention being that, as the Constitution and its Amendments do not authorize Congress to regulate private rights, the indictments under the act of 1875 were void. The government contended that the act was authorized by the 1st section of he Fourteenth Amendment, which declares, "No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MR. JUSTICE BRADLEY, speaking in reference to the 1st section of the Fourteenth Amendment, says:

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the na-

tional will, thus declared, may not be a mere *brutum fulmen,* the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect.

In the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the fourteenth amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It woud be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counter-

acting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking.

(The court comes to the conclusion that the act in question is not directed against State action, and therefore is not within the power conferred on Congress by the amendment.)

SECTION III.

OTHER RIGHTS.

See cases grouped under Chapter II, Section VIII, Restrictions on the Powers of Congress.

CHAPTER V.

STATE COMITY.

SECTION I.

Full Faith and Credit shall be given to the Acts, Records and Judgments of another State.

HANLEY *v.* DONOGHUE.

116 U. S., 1. 1885.

Michael Hanley and William F. Welch recovered a judgment in the State of Pennsylvania against two joint defendants, Charles Donoghue, who had been duly summoned to appear before the court, and John Donoghue, who had not been duly summoned. The property of the latter had been attached by the plaintiffs. This judgment was valid and enforceable by the laws of Pennsylvania. Hanley and Welch sued Charles Donoghue on this judgment in Maryland, but the lower court refused to consider the judgment as binding upon it and gave judgment for Donoghue. This judgment was affirmed by the highest court of the State. Hanley and Welch then appealed the case to the United States Supreme Court on the ground that they were denied a right and privilege to which they are entitled under Art. IV, sec. 1, of the Constitution of the United States, which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

By the settled construction of these provisions of the Constitution and statutes of the United States, a judgment of a State court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered. And it is within the power of the legislature of a State to enact that judgments which shall be rendered in its courts in actions against joint defendants, one of whom has not been duly served with process, shall be valid as to those who have been so served, or who have appeared in the action. * * * *

No court is to be charged with the knowledge of foreign laws; but they are well understood to be facts, which must, like other facts, be proved before they can be received in a court of justice. It is equally well settled that the several States of the Union are to be considered as in this respect foreign to each other, and that the

courts of one State are not presumed to know, and therefore not bound to take judicial notice of, the laws of another State. * * * *

Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause of the parties.

Congress, in the execution of the power conferred upon it by the Constitution, having prescribed the mode of attestation of records of the courts of one State to entitle them to be proved in the courts of another State, and having enacted that records so authenticated shall have such faith and credit in every court within the United States as they have by law or usage in the State from which they are taken, a record of a judgment so authenticated doubtless proves itself without further evidence; and if it appears upon its face to be a record of a court of general jurisdiction, the jurisdiction of the court over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself. Knowles *v.* Gaslight & Coke Co., 19 Wall. 58. But Congress has not undertaken to prescribe in what manner the effect that such judgments have in the courts of the State in which they are rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.

Upon principle, therefore, and according to the great preponderance of authority, whenever it becomes necessary for a court of one State, in order to give full faith and credit to a judgment rendered in another State, to ascertain the effect which it has in that State, the law of that State must be proved, like any other matter of fact. * * * *

When exercising an original jurisdiction under the Constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States.

But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here.

In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, because those laws are known to the court below as laws alone, needing no averment or proof.

But on a writ of error to the highest court of a State, in which the revisory power of this court is limited to determining whether a question of law depending upon the Constitution, laws, or treaties of the United States has been erroneously decided by the State court upon the facts before it,—while the law of that State, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error,—yet, as in the State court the laws of another State are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless

made part of the record sent up, as in Green *v.* Van Buskirk, 7 Wall. 139. The case comes, in principle, within the rule laid down long ago by Chief Justice Marshall: "That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts, and that this court, with respect to facts, is limited to the statement made in the court below, cannot be questioned." Talbot *v.* Seeman, 1 Cranch, 1, 38.

Where by the local law of a State (as in Tennessee, Hobbs *v.* Memphis & C. R. Co., 9 Heisk. 873) its highest court takes judicial notice of the laws of other States, this court also, on writ of error, might take judicial notice of them. But such is not the case in Maryland, where the Court of Appeals has not only affirmed the general rule that foreign laws are facts, which, like other facts, must be proved before they can be received in evidence in courts of justice; but has held that the effect which a judgment rendered in another State has by the law of that State is a matter of fact, not to be judicially noticed without allegation and proof; and consequently that an allegation of the effect which such a judgment has by law in that State is admitted by demurrer.

From these considerations it follows that the averment, in the third count of the declaration, that by the law of Pennsylvania the judgment rendered in that State against Charles Donoghue and John Donoghue was valid and enforceable against Charles, who had been served with process in that State, and void against John, who had not been so served, must be considered, both in the courts of Maryland, and in this court on writ of error to one of those courts, an allegation of fact, admitted by the demurrer.

Upon the record before us, therefore, the plaintiff appears to be entitled, under the Constitution and laws of the United States, to judgment on this count. The general judgment for the defendant is erroneous, and the rights of both parties will be secured by ordering, in the usual form, that the

Judgment of the Court of Appeals of Maryland be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

SECTION II.

Privileges and Immunities of Citizens.

CORFIELD *v.* CORYELL.

4 WASH. C. C., 371. 1823.

In 1820 the State of New Jersey passed an act regulating the business of dredging of oysters. This act excluded the inhabitants and residents of other States from the privilege of taking or gathering

oysters in any of the rivers, bays and waters of the State. One of the penalties provided by the statute was the forfeiture of the boat and apparatus used by any non-resident in gathering oysters in violation of the statute.

The defendant, one of the constables of Cumberland County, arrested the plaintiff, a non-resident of New Jersey, whom they found, gathering oysters in Maurice River Cove, and seized his boat and sold it. The plaintiff brought an action of trespass for the taking of his property in the United States Circuit Court for the Eastern District of Pennsylvania. The plaintiff contended that the New Jersey act of 1820 infringes that section of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

WASHINGTON, CIRCUIT JUSTICE, delivered the opinion of the court.

The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union." But we cannot accede to the proposition which was insisted on by the coun-

sel, that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all the other States the same advantages as are secured to their own citizens. A several fishery, either as the right to its respects running fish, or such as are stationary, such as oysters, clams and the like, is as much the property of the individual to whom it belongs as dry land or land covered by water; and is equally protected by the laws of the State against the aggressions of others; whether citizens or strangers. Where those private rights do not exist to the exclusion of the common right, that of fishing belongs to . . . the citizens or subjects of the State. It is the property of . . . ; to be enjoyed by them in subordination to the laws which regulate its use. They may be considered tenants in common of this property; and they are so exclusively entitled to the use of it, that it cannot be enjoyed by others without the tacit consent on the express permission of the sovereign who has the power to regulate its use. . . . The oyster beds belonging to a State may be abundantly sufficient for the use of the citizens of that State, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of the other States from taking them, except under such limitations and restrictions as the laws may prescribe." *Judgment entered for defendant.*

SECTION III.

Extradition Between States.

KENTUCKY *v.* DENNISON.

24 HOWARD, 66. 1860.

Willis Lago, a free negro resident of Kentucky, assisted a slave to escape and then he, himself, fled to Ohio. Lago's act being a crime under the laws of Kentucky, the Governor of Kentucky demanded him as a fugitive from justice to be delivered up by the Governor of Ohio. The demand was refused, whereupon Kentucky brought suit in the United States Supreme Court asking for a mandamus to compel Dennison, the Governor of Ohio, to deliver Lago to the State authorities. Kentucky claimed that the matter in dispute was covered by Art. IV, sec. 2, of the Constitution of the United States, which reads thus: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the Executive authority of the State from

which he fled, be delivered up, to be removed to the State having jurisdiction of the crime." To execute this obligation of the Constitution, the act of Congress of 1793 was passed, which provides: "It shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demands, or to the agent of such authority appointed to receive the fugitive to be delivered to such agent when he shall appear."

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.

The clause (of the Constitution) in question...authorizes the demand to be made by the Executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. * * * *

The demand being thus made, the Act of Congress declares, that, "it shall be the duty of the Executive authority of the State," to cause the fugitive to be arrested and secured and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose upon him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are far from supposing, that in using the word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution.

The motion for the mandamus must be overruled.